IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

This Court granted the petitions for writ of certiorari in these cases and in Nos. 76-585, 76-603, 76-619, and

76-620, and consolidated the cases in an order entered on April 4, 1977 (A. 292a).

OPINION BELOW

The opinion of the Court of Appeals (A. 39a-90a) is reported at 540 F.2d 1114.

JURISDICTION

The judgment of the Court of Appeals (Pet. No. 76-529, at 91a-94a) was entered on August 2, 1976. The petitions for writ of certiorari were filed on October 15, 1976 (No. 76-529), October 27, 1976 (No. 76-585), October 29, 1976 (No. 76-594 and No. 76-603), and November 1, 1976 (No. 76-619 and No. 76-620). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act are set forth in Appendix A to this brief. The regulations being reviewed are set forth at A. 226a-242a, 252a-280a, 287a, and are published as 40 C.F.R. §§ 52.01(d) and (f), and 52.21.

QUESTIONS PRESENTED

As limited by and stated in this Court's order granting the petitions for writ of certiorari, the questions presented are:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which

grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction?

STATEMENT OF THE CASE

This case involves the interpretation and application of the Clean Air Act, as amended, 42 U.S.C. §§ 1857 *et seq.* In compliance with a court order in earlier litigation interpreting that Act over his opposition to so require, the Administrator of the Environmental Protection Agency (hereinafter "EPA") has disapproved plans adopted by every State for the implementation of national primary and secondary ambient air quality standards; and EPA has amended or revised those plans by promulgating regulations which include therein provisions preventing "significant deterioration" of air which is cleaner than is required by the national primary and secondary standards. That interpretation of the Act and those actions by EPA were upheld by the court below. Among other things, those regulations confer upon Federal land managers and the governing bodies of Indian tribes authority, independent of State control and subject only to review by EPA, to reclassify Federal and Indian lands under their respective jurisdictions; and thus not only to restrict the construction of electric generating plants and other new sources of certain air pollutants upon those lands, but also upon lands owned by others up to 60 or more miles distant.

A. The Clean Air Act.

For the most part, the relevant provisions of the Clean Air Act were enacted by the Clean Air Act Amendments of 1970 (84 Stat. 1676), as summarized below. However, the "Findings and Purposes" section of the Act was first enacted in substantially its present form by the Clean Air Act of 1963 (77 Stat. 392). This includes the find-

ing that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments," which now appears unchanged in § 101(a)(3), 42 U.S.C. § 1857(a)(3). It also includes the statement of purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" which, as amended by the Air Quality Act of 1967 (81 Stat. 485) to add "and enhance the quality of" after "to protect," is now set forth in § 101(b)(1), 42 U.S.C. § 1857(b)(1). That statement of purpose is the only purported statutory basis for the significant deterioration regulations.

Under the 1970 Amendments, EPA designates each air pollutant which in its "judgment has an adverse effect on public health or welfare" (§ 108(a)(1), 42 U.S.C. § 1857c-3(a)(1)), and establishes national primary and secondary ambient air quality standards for each such air pollutant (§ 109(a), 42 U.S.C. § 1857c-4(a)). A primary standard is set at the level which EPA deems "requisite to protect the public health"—after "allowing an adequate margin of safety"—and a secondary standard is set at the level which EPA deems "requisite to protect the public welfare from any known or anticipated adverse affects associated with the presence of such air pollutant in the ambient air." § 109(b), 42 U.S.C. § 1857c-4(b).[1] Those standards "may be revised in the same manner as promulgated" (*ibid.*).

Each State has "the primary responsibility for assuring air quality within the entire geographic area com-

[1] "All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." § 302(h), 42 U.S.C. § 1857h(h).

prising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained . . . in such State." § 107(a), 42 U.S.C. § 1857c-2(a). Thus, "after reasonable notice and public hearings," each State adopts plans for "implementation, maintenance, and enforcement" of the primary and secondary standards and submits such plans to EPA for approval. § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1). EPA "shall approve" such a plan so submitted if it satisfies eight criteria or requirements specified in § 110(a)(2) of the Act (42 U.S.C. § 1857c-5(a)(2)), and also "shall approve" any revision by a State thereof if such revision meets those specified "requirements" (§ 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A)). EPA is authorized by § 110(c)(1) to propose "regulations setting forth an implementation plan, or portion thereof, for a State" only if the plan (or portion thereof) submitted by the State "is determined by" EPA "not to be in accordance with" those eight "requirements" or criteria, and EPA can promulgate such regulations and thus make them a part of the State implementation plan only if the State in the meantime has not voluntarily adopted and submitted a "plan (or revision) which" EPA "determines to be in accordance with" those "requirements." 42 U.S.C. § 1857c-5(c)(1).[2]

It has neither been contended nor held in this litigation, or in the preceding litigation, that any of the eight requirements in § 110(a)(2) consists of or includes the prevention of significant deterioration of air which would continue to comply with the national primary and secondary standards. Rather, those requirements are directed toward compliance with the national standards,

[2] Those statutory provisions also authorize EPA to propose and promulgate a State implementation plan if the State fails to do so within the time allowed—a situation which is not involved here.

including (A) "attainment of such primary standard as expeditiously as practicable" and of "such secondary standard" within "a reasonable time;" (B) "emission limitations . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard;" (E) "adequate provisions for intergovernmental cooperation . . . to insure that emissions of air pollutants . . . will not interfere with the attainment or maintenance of such primary or secondary standard . . . outside of such State or . . . other air quality control region;" and (H) "revision . . . of such plan . . . to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard" or "whenever" EPA "finds . . . that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements." 42 U.S.C. § 1857c-5(a)(2).[3]

In short, under the express terms of the 1970 Amendments, for "purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection [110](a) or promulgated under subsection [110](c) and which implements a national primary or secondary ambient air quality standard in a State." § 110(d), 42 U.S.C. § 1857c-5(d). And, only an "applicable implementation plan" as thus defined is enforceable under § 113 of the Act. 42 U.S.C. § 1857c-8.[4]

[3] Requirement (C) relates to devices, methods, systems and procedures for monitoring, compiling and analyzing "data on ambient air quality;" requirement (D) relates to "a procedure" for preconstruction "review . . . of the location of new sources to which a standard of performance will apply" (see pp. 7-8, *infra*); requirement (F) relates to State personnel, funding and authority to carry out its implementation plan, monitoring requirements, reports, procedures for correlating reports with emission limitations or standards, and contingency plans; and requirement (G) relates to the enforcement of motor vehicle emission standards.

The 1970 Amendments also added the provisions in § 111, including a requirement that EPA establish a "list of categories of stationary sources" which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare," and "Federal standards of performance for new sources within [each] such category." 42 U.S.C. § 1857c-6(b)(1). A "standard of performance" is defined to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1).

Only the operation of a new source "in violation of any standard of performance applicable to such source" is made "unlawful" by § 111(e).[5] 42 U.S.C. § 1857c-6(e). There is nothing in § 111 authorizing EPA to prevent construction or operation of a new source because it would cause deterioration of air quality which, nonetheless, would meet the national primary and secondary standards. Rather, one of the eight criteria for approval of an implementation plan under § 110(a) is that "it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of perform-

[4] Section 113 also provides for enforcement of new source performance standards issued under § 111 of the Act, of emission limitations for hazardous pollutants established under § 112, and of inspection and monitoring requirements under § 114.

[5] Thus, EPA may issue a compliance order or bring a civil action against "any person . . . in violation of section 111(e) (relating to new source performance standards), and any "person who knowingly . . . violates section 111(e)" is subject to criminal penalties. § 113, 42 U.S.C. § 1857c-8.

ance will apply." 42 U.S.C. § 1857c-5(a)(2)(D). The "paragraph (4)" referred to requires the procedure for pre-construction review of new sources to "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance . . . of a national ambient air quality primary or secondary standard . . . ." § 110(a)(4), 42 U.S.C. § 1857c-5(a)(4).

Finally, § 116 of the Act, 42 U.S.C. § 1857d-1, expressly preserves the right of the States to include in implementation plans more "stringent" limitations upon air pollution than are required by the Act. And § 118, 42 U.S.C. § 1857f, requires Federal departments, agencies and instrumentalities to "comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," except where exempted therefrom by the President in certain limited circumstances in which such an exemption is authorized by that section.[6]

B. The Significant Deterioration Regulations.

Shortly after enactment of the 1970 Amendments, EPA construed the Act to require approval of State implementation plans which complied with the eight requirements specified in § 110(a)(2), so that EPA in its own view did not have authority under the Act to disapprove such

[6] The 1970 Amendments redesignated and substantially revised §§ 109 and 111 of the 1967 Act which became the present §§ 116 and 118. While not involved here, the 1970 Amendments also added the provisions relating to national emission standards for hazardous pollutants (§ 112, 42 U.S.C. § 1857c-7), as well as amending various provisions in Title II of the Act relating to emission standards for moving sources (§§ 201 *et seq.*, 42 U.S.C. §§ 1857f-1 *et seq.*).

plans for failure to include a significant deterioration provision or to promulgate regulations amending the plans to include such a provision. When the Administrator described this interpretation before Congressional committees,[7] the Sierra Club and other groups filed a suit in the United States District Court for the District of Columbia contesting that interpretation. That court rejected EPA's interpretation of the Act, ordered EPA to disapprove plans insofar as they did not "effectively prevent significant deterioration of existing air quality," and directed EPA to propose remedial regulations amending the State plans. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D.C., 1972). The District of Columbia Circuit affirmed *per curiam* on the basis of the opinion below, 4 ERC 1815 (1972), and this Court affirmed without opinion by an equally divided Court. *Fri* v. *Sierra Club*, 412 U.S. 541 (1973).[8] Petitioners were not parties to that proceeding.

In response to that decision, EPA disapproved the implementation plans of every State insofar as they failed to provide for the prevention of significant deterioration (37 F.R. 23836); issued an initial notice of proposed rulemaking (38 F.R. 18985; A. 91a-159a); issued revised proposed regulations (39 F.R. 30999; A. 160a-205a); and, on December 5, 1974, published final signifi-

[7] Hearings on Clean Air Act Oversight before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972), at 530-531; Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess., ser. 92-H31 (1972), Pt. 1, at 246-249, 271-276.

[8] Thus, the only opinion in that case was that of District Judge Pratt. As was true of the court below in this case, he relied entirely upon the "protect and enhance" language in § 101(b)(1) as the statutory basis for the decision, and sought to support his decision by reference to legislative history of the 1970 Amendments. 344 F. Supp., at 255-256.

cant deterioration regulations (39 F.R. 42509; A. 206a-241a). In proposing such regulations, EPA stated that it did not regard the *Ruckelshaus* decision as "definitive" in view of this Court's equal division; and that EPA therefore "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality," and was acting only because of "the preliminary injunction issued by the District Court" (38 F.R., at 18986; A. 93a).

In proposing and promulgating these regulations, EPA was faced with the problem that the Act does not mention "significant deterioration" and the courts in the *Ruckelshaus* case had not determined "what constitutes significant deterioration and exactly how it will be prevented" (38 F.R., at 18986; A. 94a). So, too, the "protect and enhance" statutory language and the legislative history relied upon similarly provided no guidance, except insofar as they might imply that all degradation of air (and thus all economic growth) should be prevented—which no one contended to have been contemplated by the Congress (38 F.R., at 18987; A. 98a-99a). Furthermore, since the national ambient air standards are intended to prevent all "demonstrable or predictable adverse effects which can be quantitatively related to pollutant concentrations in the ambient air," EPA concluded that "significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare" (38 F.R., at 18987; A. 97a-98a). Hence, any judgment of what deterioration would be significant "must be essentially subjective" (38 F.R., at 18988; A. 100a), based upon "consideration of varying social, economic, and environmental factors" (39 F.R., at 31001; A. 166a), and "[a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used" (39 F.R., at 31001; A. 167a).

The regulations apply the significant deterioration provisions to two pollutants: particulate matter and sulfur dioxide. In view of the considerations outlined above (see 39 F.R., at 42510; A. 207a), EPA established a system for classifying the lands within each State. In Class I areas, "practically any" increase in the levels of those pollutants would be prohibited (and thus practically any economic growth); in Class II areas, somewhat larger increases in the levels of those pollutants would be allowed (but significantly less than would be allowed by the national standards) so that in EPA's judgment "moderate well-controlled growth" would be permissible; and in Class III areas, the level of those pollutants (and thus economic growth) could be increased up to the level allowed by the national standards (39 F.R., at 42510; A. 208a). However, since the regulations prohibit the construction of a new source which "would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State," a power plant located in a Class II area might violate Class I restrictions in areas as much as "60 or more miles away" so that the effect of a more restrictive classification "extends well beyond" its "boundaries into the adjacent areas" (39 F.R., at 42512; A. 219a).

The restrictions upon increments of the two pollutants are implemented by preconstruction review of construction of new or modified facilities which would constitute a "new source" of air pollution. Such construction would be prohibited if an applicable incremental limit would be violated, even if the best available technology would be used in compliance with § 111 of the Act. 40 C.F.R. § 52.21(d); A. 234a-237a, 255a, 287a.

The regulations initially place all areas in Class II. 40 C.F.R. § 52.21(c)(3)(i); A. 230a. "Redesignation" or reclassification of an area "may be proposed by the respective States, Federal Land Managers, or Indian

Governing Bodies," pursuant to procedures and considerations specified in the regulations, and are "subject to approval by" EPA. *Ibid.* A private landowner or manager, on the other hand, does not have a right under the regulations to propose a reclassification of his (or any other) land and, indeed, is not given a right to request his State to propose such a reclassification or to review by EPA (or anyone else) if the State refuses to do so.

The procedures and considerations applicable to proposed reclassifications are set forth in § 52.21(c)(3)(ii)-(v) of the regulations. A. 230a-232a, 253a-254a. Whether proposed by a State, Federal land manager or Indian governing body, a public hearing must be held and the proposed reclassification must be based on the record in that hearing and "must reflect . . . consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interest." A State must consult with the leaders of local governments in the area covered and, if Federal lands are involved, with the Federal land manager (it cannot propose redesignation of an Indian Reservation over which it has not asserted jurisdiction under other laws). A Federal land manager can only propose "a more restrictive designation," and must consult with the State in which the Federal land is located (or on which it borders). An Indian governing body may propose reclassification of an Indian Reservation over which the State has not assumed jurisdiction under other laws, but must consult with the State in which the Reservation is located (or on which it borders) and, if held in trust, must obtain approval of the Department of the Interior.

In general, EPA "shall approve" a proposed reclassification within 90 days, unless it finds that the pro-

cedural requirements of the regulations have not been complied with or that the State, Federal land manager or Indian governing body "has arbitrarily and capriciously disregarded relevant considerations" specified by the regulations as quoted above. 40 C.F.R. § 52.21(c)(3)(vi); A. 232a-233a, 254a. But a proposal by a State cannot be approved unless the State also has requested and has been delegated by EPA the responsibility for carrying out preconstruction review of new sources (i.e., of administering both the new source performance standards and the incremental limits upon significant deterioration). *Ibid.* If a proposed reclassification (by whomever made) is protested by a State or Indian governing body, it can be approved only if EPA itself determines in its "judgment" that the reclassification "appropriately balances" the "considerations" specified in the regulations as quoted above. *Ibid.* Protests by others, such as private landowners who would be adversely affected by a proposed reclassification, do not give rise to such an independent "judgment" by EPA.

If a State, Federal land manager or Indian governing body proposes a reclassification, or even announces that it is considering doing so, pending applications for permission to construct new or modified facilities within the area cannot be approved until EPA has acted upon the proposed reclassification, thus subjecting such prior (as well as future) applications to the incremental limits applicable to the revised classification (if approved). 40 C.F.R. § 52.21(d)(5); A. 237a. EPA has construed this provision to apply also to applications relating to construction of facilities located outside the area proposed to be redesignated, if it could affect air quality within that area. See the September 28, 1976 Guidance Memorandum set forth as App. D to the Petition in No. 76-620.

C. The Proceedings Below.

Within 30 days after promulgation of the significant deterioration regulations, these and other petitioners filed petitions for review pursuant to § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1). A. 11a-38a. All those not filed in the District of Columbia Circuit were transferred to that Court and the cases were consolidated for briefing and argument. The Court of Appeals upheld the regulations. Its August 2, 1976 opinion was written by Judge Wright, who was joined by Judge Robinson. Judge Wilkey "concur[red] in the result only" without writing a separate opinion (A. 90a).

The Court of Appeals generally applied the "arbitrary and capricious" standard of the Administrative Procedure Act, which it deemed to require "that agency action be affirmed if a rational basis exists therefor" (A. 53a). But in regard to the "question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards," which "is necessarily the first level of analysis," the Court of Appeals "require[d] the clearest showing that *Sierra Club* v. *Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court" (A. 54a, 55a). After reconsidering the *Ruckelshaus* decision under that standard of review, the Court of Appeals found "no substantial reason to question" its "continuing validity" (A. 67a; generally, at 54a-67a).

As noted above, the only statutory basis asserted for the holding that the Clean Air Act requires prevention of significant deterioration was the "protect and e..hance" language in § 101(b)(1), setting forth one of the purposes of the Act (A. 55a-56a). The primary reliance of the court below, however, was placed upon certain legislative history of the 1970 Amendments (A. 56a-61a), which was thought to afford "every indication that Congress

intended in 1970 to continue a policy of prevention of significant deterioration of air quality" (A. 60a-61a). The Court of Appeals also thought that its interpretation was bolstered by "recent congressional statements" upon pending legislation (A. 61a-62a), and by the acceptance of the *Ruckelshaus* decision "in a number of other circuits" (A. 62a). It rejected contentions that the "shall approve" language in § 110(a)(2) of the Act, as interpreted and applied by decisions of this Court subsequent to *Ruckelshaus*, necessitated a contrary holding (A. 62a-66a).

In addition, the Court of Appeals rejected a number of contentions to the effect that the significant deteriorations are arbitrary and capricious or otherwise invalid, even assuming that the Clean Air Act requires prevention of significant deterioration (A. 67a-87a).[9] But the Court of Appeals did not reach the merits of the only such contention before this Court for review under the limited grant of certiorari (*i.e.*, the second question presented). Rather, with respect to the arguments as to the validity of the provisions authorizing Federal land managers and the governing bodies of Indian tribes to reclassify Federal and Indian lands, the court below held that "the issue is not yet ripe for review" (A. 86a). That holding was based upon the fact that "[n]o federal or Indian land has yet been redesignated," the possibility that EPA might "approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies," and the conclusion "that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct," so that the court below did "not foresee any irreparable injury which

[9] The Court of Appeals also rejected contentions that the Act, if interpreted to authorize the regulations, would be unconstitutional (A. 87a-89a).

may arise from deferral of this question until it arises in a more concrete context" (A. 86a-87a).

SUMMARY OF ARGUMENT

I. In compliance with an order entered over its opposition in the *Ruckelshaus* case, EPA has disapproved the implementation plans of every State and promulgated regulations amending those plans to prevent significant deterioration of air that nonetheless would satisfy the national primary and secondary ambient air quality standards established pursuant to the Clean Air Act. Those actions by EPA are contrary to the express requirement in § 110(a)(2) of the Act that EPA "shall approve" State implementation plans that meet eight specified criteria, and to the express limitation in § 110(c) upon EPA's authority to promulgate regulations amending such plans to circumstances in which an implementation plan "is not in accordance" with those criteria. The eight criteria are directed to the attainment and maintenance of the national primary and secondary standards, and no one has contended that any of them includes the prevention of significant deterioration of air where those standards will continue to be maintained.

Since its affirmance of the *Ruckelshaus* case by an evenly divided Court, this Court concluded in *Train* v. *Natural Resources Def. Council*, 421 U.S. 60 (1975), that the "shall approve" language in § 110(a)(2), as incorporated by § 110(a)(3) to apply to approval by EPA of proposed revisions by a State of its implementation plan, is mandatory in fact as well as in form; and the Court held that EPA therefore must approve proposed variances from such plans if the criteria set forth in § 110(a)(2) would continue to be satisfied, including variances that would permit cleaner air to deteriorate to the level of the national standards. Subsequently, in *Hancock* v. *Train*, 426 U.S. 167 (1976), and in *Union*

Electric Co. v. *EPA*, 427 U.S. 246 (1976), this Court reiterated its understanding that § 110 mandates approval by EPA of State implementation plans (or revisions thereof) that comply with the specified criteria, and applied that interpretation to other circumstances in the *Union Electric* case. Those decisions have resolved any doubts that may have existed at the time of the even division in the *Ruckelshaus* case, and should be sufficient in themselves to establish that the significant deterioration regulations are invalid.

This interpretation of § 110 also is supported by the contemporaneous interpretation of EPA, which initially concluded that the statute did not authorize it to disapprove State implementation plans, and to promulgate regulations amending those plans, for failure to prevent significant deterioration. It is that initial interpretation by EPA, rather than its subsequent actions compelled by the order in the *Ruckelshaus* case, that is entitled to weight in the courts. *Train* v. *National Resources Def. Council*, *supra* at 75, 87. In addition, the significant deterioration regulations are inconsistent with other provisions of the Act. Thus, only an "applicable implementation plan" is enforceable under § 113 of the Act, and an "applicable implementation plan" is defined in § 110(d) as one "which implements a national primary or secondary ambient air quality standard in a State." So, too, § 111(e) makes "unlawful" only the operation of a new source of pollution "in violation of any standard of performance applicable to such source" which has been established pursuant to § 111, while the regulations would prohibit construction or operation of a new source which would violate either such a new source performance standard or the incremental limits which EPA has established for purposes of defining what constitutes significant deterioration. See, also, §§ 110(a)(2)(D) and (a)(4) of the Act.

The only purported statutory basis for the regulations is the statement in § 101(b)(1) that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Such a general statement of purpose does not afford a basis for disregarding express requirements in the substantive provisions of the statute. That is particularly true in regard to a provision, such as § 110, which is both more specific and later enacted. Moreover, the statement in § 101(b)(1) does not include a purpose to prevent significant deterioration either in terms or by necessary implication.

But even if § 101(b)(1) had stated such a purpose, it would be compatible with our view that the "shall approve" language in § 110(a)(2) is actually as well as literally mandatory. Both that assumed purpose and the mandatory provisions of § 110 can and should be effectuated by recognizing that the prevention of significant deterioration has been left to the individual States pursuant to their authority under § 116 to establish more "stringent" standards than are required by the Act, and in accordance with the long-standing policy now expressed in § 101(a)(3) that "the prevention and control of air pollution at its source is the primary responsibility of the States and local governments;" and to the new source performance standards established pursuant to § 111 which require new or modified facilities to achieve "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction)" EPA "determines has been adequately demonstrated."

The Court of Appeals primarily relied upon a passage in the Senate Report on the 1970 Amendments to the Clean Air Act, which purportedly demonstrates acquies-

cence at that time by the Congress in an administrative interpretation of § 101(b)(1), as contained in a 1967 version of the Act, to include a policy of preventing significant deterioration. But there is no sound basis either for the purported administrative interpretation or the purported Congressional acquiescence, and the legislative history supports our interpretation of the Act.

The purpose clause in § 101(b)(1) was enacted by the Clean Air Act of 1963, except for the words "and enhance the quality of" which were added by the Air Quality Act of 1967. No litigant has claimed that there is legislative history of either the 1963 Act or the 1967 Act demonstrating that that clause was intended to include a policy of significant deterioration; rather, the legislative history of the 1963 Act shows that the Congress intended to protect air quality through the means provided in the substantive provisions of the Act, and the legislative history of the 1967 Act similarly shows that the Congress intended to enhance air quality in like manner. The purported administrative interpretation of the 1967 Act related to the standards to be established for air quality control regions under that Act, rather than to the deterioration of air that would continue to maintain or exceed those standards, and such control regions were established only in areas where the air already was so polluted as to endanger the public health or welfare.

The single passage in the Senate Report on the 1970 Amendments, upon which the court below so heavily relied, is the only bit of legislative history through the enactment of those Amendments which anyone has contended in this litigation to demonstrate a recognition by any member of the Congress that the § 101(b)(1) purpose clause includes a policy of preventing significant deterioration. Yet, that passage does not refer to the purpose clause or to the purported administrative in-

terpretation thereof and, while ambiguous, in context appears to refer only to the maintenance of air quality at levels which will comply with the national primary and secondary standards. On the other hand, not only the Senate Report but also the House and Conference Reports on the 1970 Amendments, affirmatively demonstrate that the Congress did in fact intend the "shall approve" language in § 110(a)(2) to be mandatory, and that the imposition of any requirements more stringent than is necessary to comply with the national primary and secondary standards was in fact intended to be left to the States under § 116 and to the establishment of new source performance standards pursuant to § 111. Hence, that single passage in the Senate Report cannot possibly justify the significant deterioration regulations, and there is no other basis for those regulations.

II. The significant deterioration regulations establish a classification system under which the increments of particulate matter and sulfur dioxide that would be allowed basically are related to the degree of economic growth or development deemed to be desirable. In general, only the States may propose reclassification of areas within their respective boundaries, in accordance with considerations specified in the regulations and subject to approval by EPA, but Federal land managers are given authority to propose a more restrictive classification for Federal land under their respective jurisdictions, and only the governing body of an Indian tribe may propose reclassification of tribal land if the State in which it is located has not asserted jurisdiction over such land under other laws. Such a reclassification may affect the construction of new sources not only on the Federal and Indian lands involved, but also on adjacent lands for a distance of up to 60 to 100 miles if by reason of wind drift they could contribute to the increment of the pollutants in the air over the Federal or Indian land.

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Even if the Court holds, contrary to our view, that EPA did have authority under the Clean Air Act to promulgate the significant deterioration regulations in general, those provisions for reclassifying Federal and Indian lands violate the Clean Air Act. Section 107(a) delegates to each State "the primary responsibility for assuring air quality within the entire geographic area comprising such State," and no exception is made—either in § 107 or elsewhere in the Act—for Federal or Indian lands. Yet, a State cannot even propose reclassification of Indian lands, a reclassification proposal by a Federal land manager (if approved by EPA) overrides a proposal by a State in regard to Federal land, and a more restrictive reclassification of either Federal or Indian land in effect determines also the permissible utilization of adjoining State and private lands over wide areas. The extent and distribution of Federal and Indian lands in some western States is such that the use of most, if not all, other lands in the State could be affected by reclassifications of the Federal and Indian lands. Moreover, although the regulations amend State implementation plans and were promulgated by EPA in its role as a surrogate for the States, they arbitrarily discriminate against a State's municipal and private landowners and managers who are given no right to propose a reclassification of their lands.

While EPA suggested in promulgating the regulations that the reclassification authority given to Federal land managers is "consistent" with § 118 of the Act, EPA did not even contend that such authority is conferred by § 118 and in fact it is contrary to that statutory provision. Under § 118, Federal agencies "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements.*" (Emphasis added.) The authority given to Federal land managers is not merely declaratory of the proprietary

right of the Federal Government to impose more restrictive requirements on the use of its lands, as EPA also suggested, since reclassification also affects the use of adjoining State and private lands. And, that authority is not necessary to protect air quality over national forests and parks, despite a suggestion by EPA to the contrary, as the primary responsibility of a State in that regard "within the entire geographic area comprising such State" includes national parks and forests located within the State. Moreover, reclassifications are based upon considerations unrelated to air quality and going primarily to economic growth and development.

EPA's explanation of the reclassification authority given to Indian governing bodies, as being "consistent with the independent status of Indian lands not subject to State laws," shows that it has misconceived the relationship among Indian tribes, the States and the Federal Government. State implementation plans do not constitute some independent exercise of State law, but rather are authorized and required by the Clean Air Act so as to fulfill the State's duty under § 107(a) to assure air quality within its "entire geographic area." Such a general Act of Congress applies to Indians and their lands, "in the absence of a clear expression to the contrary . . . ." *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). The Clean Air Act does not contain any "expression to the contrary," but rather expressly provides that the authority delegated to a State thereunder is to apply throughout the entire geographic area of the State.

Although the Court of Appeals did not decide the merits of these issues regarding the validity of the reclassification provisions, holding that they were not ripe for judicial review, this Court's limited grant of certiorari did not expressly include the ripeness issue. Thus, the Court may have concluded already that the issues going

to the merits are ripe for review, but if not it should do so. The mere existence of the reclassification authority given to Federal land managers and Indian governing bodies affects the present conduct of petitioners and others, since they cannot base their future planning upon the existing classification of land. A proposal or, indeed, the mere announcement that consideration is being given to a proposal for reclassification by a Federal land manager or Indian governing body results in the suspension by EPA of the processing of pending applications for permits to construct new sources on adjacent lands, and the incremental limits under the revised classification (if approved) will be applied to such pending permit applications. Thus, EPA has refused to approve a permit application by certain of these petitioners, even though the electric generating units involved would comply with existing Class II limits, because of a proposal by an Indian tribe to reclassify its adjacent lands in Class I.

Moreover, under § 307(b)(1) of the Clean Air Act, petitions attacking the validity of the regulations promulgated by EPA must be filed within 30 days after the promulgation, as in fact was done, if not "based solely on grounds arising after such 30th day." The issues concerning the validity of the reclassification provisions are purely issues of law which arose when the regulations were promulgated. Even if the ripeness of those issues for judicial review otherwise was doubtful, this special jurisdictional provision would warrant the Court in reviewing the issues on the merits, *Buckley* v. *Valeo*, 424 U.S. 1, 117 (1976), particularly since those issues could not be raised later and will be insulated from any judicial review if not reviewed now.

ARGUMENT

I. The Significant Deterioration Regulations Violate the Clean Air Act.

Section 110(a)(2) of the Act expressly provides that EPA "shall approve" State implementation plans that satisfy eight specified requirements, none of which includes prevention of significant deterioration. In three recent cases, this Court has construed that "shall approve" language to be mandatory in fact as well as in form. Prior to the *Ruckelshaus* case, EPA construed that language to deprive it of authority to disapprove State plans for failure to prevent significant deterioration. The significant deterioration regulations also are inconsistent with other provisions of the Act, and they are not supported by the statement of purpose in § 101(b)(1) or by the legislative history upon which the court below relied. For these and other reasons discussed more fully below, the significant deterioration regulations are invalid and should be set aside by this Court.

1. *EPA's disapproval of the State implementation plans and its amendment of those plans to include the significant deterioration regulations are contrary to mandatory language in § 110 of the Act.* Section 110(a)(2) expressly provides that EPA "shall approve" a State implementation plan which satisfies eight requirements or criteria set forth therein. Section 110(a)(3) expressly provides that EPA "shall approve" any revision of a State plan which satisfies those eight requirements. And, § 110(c)(1) authorizes EPA to propose and promulgate regulations amending a State implementation plan only if the plan is not "in accordance with the requirements" set forth in § 110(a)(2). See pp. 4-5, *supra*. That statutory language is plain, unambiguous and mandatory in nature. No exception is made in § 110 or elsewhere in

the Act which, indeed, does not mention significant deterioration.

It has neither been contended nor held in this litigation, or in the prior *Ruckelshaus* litigation, that any of those eight requirements consists of or includes prevention of significant deterioration of the quality of air that would remain as clean as or cleaner than the quality required by the national primary and secondary air quality standards. To the contrary, those requirements are directed towards the "attainment" and "maintenance" of the national standards. See pp. 5-6, *supra*. Consequently, there can be no doubt that the actions of EPA in disapproving all State implementation plans and promulgating the significant deterioration regulations as amendments thereto, which actions were taken pursuant to the order entered in the *Ruckelshaus* case over EPA's opposition, conflict with the express provisions of § 110 of the Act.

2. *The decision below is contrary to decisions of this Court construing § 110 to be mandatory in fact as well as in form.* The affirmance of the *Ruckelshaus* decision by an evenly divided Court is, under well established principles, without precedential effect. See, *e.g.*, *Neil* v. *Biggers*, 409 U.S. 188, 190-192 (1972). Whatever the reasons for affirmance may have been at the time, the entire Court, after further consideration of the Clean Air Act in three subsequent cases, has construed that Act in a manner inconsistent with the *Ruckelshaus* decision and with the decision below in this case. The Court has construed the "shall approve" language in § 110 to be actually as well as literally mandatory, so that EPA *must* approve a State implementation plan, or revision thereof, that satisfies the eight requirements prescribed in § 110(a)(2).

In *Train* v. *Natural Resources Def. Council*, 421 U.S. 60 (1975), the issue was whether § 110(a)(3) requires

EPA to approve certain variances from emission limitations specified in State implementation plans as "revisions" of such plans. Such variances would permit more air pollution than an implementation plan otherwise would permit, but the plan as so revised nonetheless would attain and maintain the national ambient air quality standards and otherwise comply with the eight requirements specified in § 110(a)(2). In holding that "the revision mechanism of § 110(a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that . . . the national primary ambient air standards be attained . . . and maintained thereafter" (*id.*, at 99), this Court pointed out that under § 110(a)(3) "Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans" (*id.*, at 80), and that (*id.*, at 79):

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (Emphasis by the Court.)

The only dissenter (without opinion) was Mr. Justice Douglas, and only Mr. Justice Powell did not participate in the decision (*id.*, at 99).

The Court's conclusion in *Train* that the Act requires EPA to approve State implementation plans and revisions which provide "for the timely attainment and subsequent maintenance of [the national primary and sec-

ondary] ambient air standards" has been reaffirmed in two subsequent decisions: *Hancock* v. *Train*, 426 U.S. 167 (1976), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976).

In the course of holding (over the dissent of Justices Stewart and Rehnquist) in *Hancock* that § 118 of the Act does not require Federal installations to abide by the permit requirement of State implementation plans, this Court observed that EPA is "required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)." 426 U.S., at 169-170.[10] And, while holding in *Union Electric Co.* that courts may not review and overturn EPA's approval of a State implementation plan on the basis of "claims of economic and technological infeasibility" since EPA itself cannot "consider such claims in approving or rejecting a state implementation plan" (427 U.S., at 256; generally, at 256-266), this Court pointed out (427 U.S., at 257) that § 110(a)(2):

> ". . . sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train* v. *NRDC*, *supra*, at 71 n. 11, 79, and none of the

[10] See, also, *id.*, at 170. So, too, this Court contrasted the use of the "permissive" word "may" in relevant provisions of §§ 111, 11[illegible] and 114 with the use of the mandatory word "shall" in § 110(a) under which a State "must promulgate an implementation plan," to support its holding in *Hancock* that Federal facilities are not subject to State permit requirements. *Id.*, at 192, 194-195. See, also, *Natural Resources Defense Council, Inc.* v. *Train*, 545 F.2d 320, 324-325 (2d Cir., 1976), which holds that the requirement in § 108(a)(1) of the Act that EPA "shall . . . publish" a list including each pollutant that has an adverse effect on public health or welfare is "mandatory."

> eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, *if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria*, and so it is here that the argument is focused." (Emphasis added.)

All members of the Court joined in that opinion. And, we repeat, no one in this litigation has contended and the court below did not hold that there is a "basis" for requiring State plans to prevent significant deterioration "among the eight criteria" specified in § 110(a)(2).

The court below rejected this Court's interpretation of § 110(a)(2) as mandating approval by EPA of State implementation plans that satisfy the eight requirements specified therein, regardless of other considerations, on the ground that the *Train* and *Union Electric* cases "did not consider the issue of nondeterioration" or "the significant deterioration of air cleaner than the national standards" (A. 64a, 65a), and that the pertinent statement in *Hancock* was "dictum" (A. 63a, n. 39). As a matter of fact, however, *Train* was not concerned only "with air pollution below [*i.e.*, dirtier than] national standards" (A. 64a), but also involved variances which would permit cleaner air to deteriorate to the level of the national standards.[11] In any event, this Court's reiteration in *Hancock* and *Union Electric* of the conclusion in *Train* that the "shall approve" language is mandatory, and the application of that interpretation in *Union Electric* to a completely different factual situation, demonstrates

[11] This Court expressly noted that treating variances as revisions under § 110(a)(3) "would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date; and second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance." 421 U.S., at 77. The second situation is the one in which deterioration of cleaner air to the level of the national standards would be permitted by approval of a variance.

its general application to situations in which EPA's approval of (or disapproval and promulgation of amendments to) State implementation plans is involved. The Court did not make any exception for plans that fail to provide for the prevention of significant deterioration, or even reserve that situation,[12] and no exception is made in § 110 itself.

3. *The decision below is contrary to EPA's contemporaneous interpretation of § 110.* EPA initially construed the 1970 Amendments to require its approval of State implementation plans which complied with the eight criteria specified in § 110(a)(2), and thus concluded that such plans could not be disapproved or amended for failure to include provisions for the prevention of significant deterioration. See pp. 8-9, *supra*. That interpretation was asserted and defended by EPA, the Department of Justice and the Office of the Solicitor General throughout the *Ruckelshaus* litigation. See p. 9, *supra*. And, in proposing the significant deterioration regulations pursuant to an injunctive order in *Ruckelshaus*, EPA made clear that it "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality." See p. 10, *supra*.

A similar situation was involved in the *Train* case when decided by this Court. EPA's initial "interpretation of § 110(a)(3), which provides that the Agency shall approve any revision of an implementation plan which meets the § 110(a)(2) requirements applicable to an original plan," was that "§ 110(a)(3) permits a State

[12] This Court hardly could have been unaware of the significant deterioration issue, as the opinion of the Fifth Circuit before the Court in *Train* and the opinion of the Eighth Circuit before the Court in *Union Electric* are among those that uncritically accepted *Ruckelshaus* as establishing a requirement for the prevention of significant deterioration. See 489 F.2d 390, 408 (5th Cir., 1974), and 515 F.2d 206, 220 (8th Cir., 1975). And see n. 29, p. 56, *infra*.

to grant individual variances from generally applicable emission standards . . . so long as the variance does not cause the plan to fail to comply with the requirements of § 110(a)(2)." 421 U.S., at 70. But after four courts of appeals had rejected that interpretation, EPA "modified its guidelines to comply with the then-unanimous rulings that after the attainment date the postponement provision was the only basis for obtaining a variance." 421 U.S., at 74.

This Court concluded in *Train* that, even if EPA's original "construction of the Act was [not] the only one it permissibly could have adopted," it "was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." 421 U.S., at 75. Since "the Agency's interpretation of §§ 110(a)(3) and 110(f) was 'correct' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one," and in view of the "facts that the Agency is charged with administration of the Act, and that there undoubtedly has been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 480-481 (1921)." 421 U.S., at 87.

We submit that EPA's initial interpretation of § 110(a)(2) involved in this case also "was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." That interpretation, like EPA's interpretation involved in *Train*, was based upon the mandatory "shall approve" language which is equally applicable to approval of State implementation plans under § 110(a)(2) and to approval of revisions of such plans under § 110(a)(3). In both situations, the identical requirements must be satisfied in order for the "shall approve" language to apply, and those requirements do not include prevention of significant deterioration, just as they do not include prevention of variances, so long as the State implementation plan does not fail to provide for attainment and maintenance of the national primary and secondary standards. In short, EPA's contemporaneous interpretation of § 110 provides additional support for the position which we advocate in this case, just as that Agency's similar interpretation of § 110(a)(3) provided support for this Court's decision in *Train*, in accordance with general principles enunciated and applied by this Court in many cases including those cited in *Train* as quoted above.

4. *The significant deterioration regulations also are inconsistent with other provisions of the Act.* We have emphasized the mandatory "shall approve" language in § 110(a)(2) of the Act. That is the statutory provision which expressly and directly applies to EPA's approval or disapproval of State implementation plans, and to its promulgation of regulations amending such plans insofar as they have been disapproved. It should not be overlooked, however, that the significant deterioration regulations also are inconsistent with other provisions of the Act.

Most important in this regard is the fact that EPA has sought to enforce those regulations by prohibiting the construction or operation of a new source of air pollution if a violation of the significant deterioration increments would result, even though the new source would use the best available system of emission reduction in compliance with the Federal standards of performance for new sources established pursuant to § 111 of the Act. See p. 11, *supra*.

That enforcement provision is not consistent with § 111(e), under which only the operation of a new source

"in violation of any standard of performance applicable to such source" is made "unlawful," and subjected to enforcement under § 113. See p. 7, *supra*. Neither is it consistent with the § 110(d) definition of an "applicable implementation plan" as one which "has been approved under subsection [110](a) or promulgated under subsection [110](c) *and which implements a national primary or secondary ambient air quality standard in a State*" (emphasis added). The only implementation plans enforceable under § 113 are such "applicable implementation plan[s]." See pp. 6-7, *supra*. Those inconsistencies are tied together, and to the inconsistency of the significant deterioration regulations with the requirements in § 110 for approval of a State plan or revision thereof, by the fact that, under §§ 110(a)(2)(D) and (a)(4), one such requirement is that the implementation plan "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent *the attainment or maintenance . . . of a national ambient air quality primary or secondary standard*" (emphasis added). See pp. 7-8, *supra*.

In sum, the enforcement provisions of the Act are limited to enforcement of the new source performance standards established under § 111 and of "applicable implementation plans" which "implement a national primary or secondary ambient air quality standard," including preconstruction review aimed at preventing the construction or modification of a new source at a location where such construction or modification would "prevent the attainment or maintenance" of those national standards. As so written and construed, the substantive provisions of the Act in regard to both State implementation plans and new source performance standards, and the enforcement provisions of the Act, make a harmonious

whole. On the other hand, by providing that preconstruction review of new (including modified) sources shall also encompass compliance with the requirements of the significant deterioration regulations, those regulations are as inconsistent with §§ 111 and 113 of the Act as they are with § 110.

5. *Approval of State implementation plans which do not prevent significant deterioration is not inconsistent with the purposes of the Act.* The only purported statutory basis for the holdings by the lower courts, both in this case and in the prior *Ruckelshaus* case, is the statement in § 101(b)(1) that one of the purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . ." See pp. 9 n. 8, and 14, *supra*. Even if that statement of purpose included a general purpose that EPA prevent significant deterioration of air that will continue to comply with the national primary and secondary standards, it could hardly override the express substantive requirement in § 110 that EPA "shall approve" a State implementation plan that satisfies the criteria set forth in § 110(a)(2)—none of which includes the prevention of significant deterioration.[13] That is particularly true since § 110 is the more specific statutory provision. One of the accepted canons of statutory con-

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[13] In *Connecticut Co.* v. *Power Comm'n*, 324 U.S. 515, 527 (1945), for example, this Court held that language of general purpose in the Federal Power Act favoring State, as opposed to Federal, regulation "cannot nullify a clear and specific grant of jurisdiction" to the Federal Power Commission contained in the substantive provisions of the Act "even if the particular grant seems inconsistent with the broadly expressed purpose." As this Court pithily stated in *Train* v. *City of New York*, 420 U.S. 35, 45 (1975), "legislative intention, without more, is not legislation."

struction is that, where statutory provisions conflict with each other, the more specific provision prevails.[14]

But however that may be, there is nothing in the literal language of that purpose clause which necessarily encompasses, even in general terms, the significant deterioration regulations promulgated by EPA. Certainly, those regulations cannot be based upon the "protect and enhance" language alone, as such an interpretation would not permit any deterioration of existing air quality—which no one even suggests was intended by the Congress—while the regulations permit some deterioration even in Class I areas. Moreover, the stated purpose is to protect and enhance the "quality of the *Nation's* air resources" (emphasis added), not of each and every location in the Nation. Implementation of the national secondary and primary standards, the new source performance standards and other substantive provisions of the Act (such as the standards of emissions for moving vehicles) obviously will "protect and enhance the quality of the Nation's air resources" on an overall national basis.

Furthermore, the stated purpose is to protect and enhance the quality of the Nation's air resources "so as to promote the public health and welfare and the productive capacity of its population." Promotion of the "public health" as that term is used in the Act is assured by implementation of the national primary standards which are set at levels EPA deems "requisite to protect the public health" after "allowing an adequate

[14] This is true even if the more specific provision is enacted prior to the general provision. *E.g., Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). And, of course, since § 110 was enacted in 1970, after the enactment of § 101(b)(1) in 1963 and its amendment in 1967, any otherwise "irreconcilable" conflict should be resolved in favor of § 110, even if those provisions were equally specific. *E.g., Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States* v. *Borden Co.*, 308 U.S. 188, 198-199 (1939).

margin of safety;" and promotion of the "public welfare" as that term is used in the Act is assured by implementation of the national secondary standards which are set at levels EPA deems "requisite to protect the public welfare from any known or anticipated adverse affects associated with the presence of such air pollutant in the ambient air." See p. 4, *supra*. Since the purpose clause uses the very terms—"public health" and "public welfare"—explicated in the national primary and secondary standards, the purpose stated in § 101 (b) (1)—protection and enhancement of the quality of the Nation's air resources—clearly is served by implementing the national primary and secondary standards. And, the "productive capacity of [the Nation's] population" would be hindered, rather than "promot[ed]," by the significant deterioration regulations insofar as they prevent construction or modification of productive facilities that satisfy the national primary and secondary standards.

Indeed, the purpose clause in question could be given effect, without overriding the "shall approve" language in § 110, even if § 101(b)(1) stated that a purpose of the Act is to prevent the significant deterioration of air which exceeds the quality required by the national primary and secondary standards. From its beginning in 1955, the Clean Air Act has included the policy, now stated in § 101(a)(3), that "the prevention and control of air pollution at its source is the primary responsibility of the States and local governments." [15]

[15] The 1955 Act, which primarily provided for Federal research and assistance to the States, included a statement of "the policy of the Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution" (69 Stat. 322). That statement was enacted in its present form by the Clean Air Act of 1963, which first enacted the Findings and Purposes section (77 Stat. 392-393) now set forth in substantially identical language in § 101 of the Act.

While the subsequent history of the Act has been one of gradually expanding Federal participation in the abatement of air pollution and the 1970 Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," "[n]onetheless, the Amendments explicitly preserved the principle: 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . .'" *Train* v. *Natural Resources Def. Council*, *supra* at 64. See, generally, *id.*, at 63-65, and pp. 53-54, *infra*. Thus, § 116 of the Act expressly preserves the right of the States to impose more "stringent" standards and limitations than those required by the Act.

If § 101(b)(1) did include a policy to prevent significant deterioration, therefore, the obvious conclusion is that the policy is for the States to implement as they see fit pursuant to § 116, rather than that the mandatory "shall approve" language in § 110 should be disregarded so as to create a Federal role in the implementation of that policy which has not been provided for in the substantive provisions of the Act. That is emphasized by the fact that § 101(b)(1) was enacted (except for the "and enhance" language) by the Clean Air Act of 1963 which merely "authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate *interstate* pollution in limited circumstances." *Train* v. *Natural Resources Def. Council*, *supra* at 63-64 (emphasis by the Court). So, too, under the Air Quality Act of 1967, which amended § 101(b)(1) to add the "and enhance" language so as to enact it in its present form, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." *Id.*, at 64. See pp. 40-44, *infra*.

It was not until the 1970 Amendments that the Congress, because of the "little progress" made by the States, "reacted by taking a stick to the States" so that for "the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." *Id.*, at 64-65. But that "stick" consisted of the substantive provisions set forth in §§ 107-112 of the Act, including the provision in § 110 that EPA "shall approve" State implementation plans, and revisions thereof, that meet the requirements set forth in § 110(a)(2), and that authorizes EPA to promulgate regulations amending such plans only insofar as they fail to satisfy those requirements.

We submit, therefore, that even if § 101(b)(1) did include a purpose to prevent significant deterioration of air that would continue to comply with the national standards, the reasonable conclusion is that implementation of that purpose is one of the matters that the Congress has left to the "primary responsibility of States and local governments" pursuant to the long-standing policy stated in § 101(a)(3). By thus giving effect to that policy and to the "shall approve" language in § 110, as well as to the purpose expressed in § 101(b)(1) (assuming that it includes prevention of significant deterioration), such an interpretation would accord with the fundamental rule of statutory construction that, if possible, the various provisions of a statute are to be construed so as to give effect to each rather than overriding or disregarding the language of one such provision.[16]

Finally, even if § 101(b)(1) is read to imply both a purpose to prevent significant deterioration and a Federal role in such prevention, that still would not justify disregarding the express and unambiguous language of

[16] See, *e.g.*, *FAA Administrator* v. *Robertson*, 422 U.S. 255, 261 (1975); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

§ 110. As EPA observed in proposing the significant deterioration regulations, pursuant to the injunction in the *Ruckelshaus* case, nothing in § 101(b)(1) or the legislative history relied upon by the courts defines significant deterioration or suggests specific or particular measures for its prevention. See page 10, *supra*. Any such general undefined policy of preventing significant deterioration can be accommodated by the new source performance standards required to be established under § 111, mandating use of the best available system of reducing emissions that is economically feasible. Section 111 does—and was intended to—afford a Federal means of protecting the quality of air that is cleaner than is required by the national primary and secondary standards. *Natural Asphalt Pavement Ass'n* v. *Train*, —— U.S. App. D.C. ——, 539 F.2d 775, 783 (1976). See p. 54, *infra*. Certainly, there is no basis in § 101(b)(1), or in the legislative history, or in reason for concluding that even more stringent limitations can be demanded by EPA of every State.

To summarize, the language of § 101(b)(1) cannot reasonably be construed as expressing a purpose to prevent significant deterioration of air that would remain as clean as or cleaner than is required by the national primary and secondary standards. But even if § 101(b)(1) does express such a purpose, it would not afford a basis for overriding the express provisions of § 110, which were enacted later and are more specific than § 101(b)(1). Both that assumed purpose and the provisions of § 110 can and should be effectuated, by recognizing that the prevention of significant deterioration has been left to the States under § 116 and to the new source performance standards established pursuant to § 111, rather than to EPA under § 110.

6. *The significant deterioration regulations are not supported by legislative history.* In view of the plain language of § 110 and decisions of this Court interpreting that language to mean what it says, as well as the other circumstances discussed above, there is little if any need to resort to the legislative history of the Clean Air Act. But since the court below primarily relied upon certain legislative history of the 1970 Amendments, which was thought to afford "every indication that the Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality" (see pp. 14-15, *supra*), we have concluded that we should address the legislative history in depth despite the risk of overemphasizing its importance. When that is done, it becomes apparent that the material relied upon does not support the conclusion of the court below and that, to the contrary, the legislative history affirmatively demonstrates that the Congress intended the "shall approve" language in § 110 to be mandatory in fact as well as in form.[17]

[17] The court below also relied to some extent upon "recent congressional statements" made last year in connection with proposed amendments to the Clean Air Act which the Congress considered, but did not enact. The proposed amendments included lengthy provisions that would expressly and specifically limit the deterioration of air cleaner than the national standards require. While the committee reports and statements during the debates by proponents of the legislation do contain assertions to the effect that the "protect and enhance" purpose clause in § 101(b)(1) of the Act (as enacted by the 1967 Act) incorporates a "policy" of preventing significant deterioration, which was not altered by the 1970 Amendments, opponents were equally clear that no such "policy" had ever been intended by the Congress. Moreover, even those who supported the view that such a "policy" was included within the general purpose expressed by § 101(b)(1) conceded that the Congress had not spelled out what would constitute significant deterioration or the process by which it would be prevented. The pertinent statements in these regards are collected in the Petition in No. 76-529, at 20-24. In view of the conflicting nature of those statements, we see no need to discuss them further as they exemplify the reasons why "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). However, a comparison of the extensive consideration which the Congress devoted to the significant deterioration issue when

The starting point must be the Clean Air Act of 1963 because it first enacted (as § 1) the Findings and Purposes section now designated as § 101,[18] including the purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" (77 Stat. 393). Since that purpose clause (as amended in 1967 to add "and enhance the quality of" after "to protect") is the sole asserted statutory basis for the significant deterioration regulations, and since any requirement for the prevention of significant deterioration at most involves protection rather than enhancement of air quality, it would seem that if such a requirement exists it must have originated with the 1963 Act.

No one has contended, however, either in this litigation or in the prior *Ruckelshaus* litigation, that there is any legislative history of the 1963 Act which demonstrates a Congressional intent or policy to prevent significant deterioration, and we have found none. Rather, the legislative history demonstrates that the Congress had no such intent. As this Court said in the *Train* case, the 1963 Act was enacted to authorize "federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate *interstate* pollution in limited circumstances." See p. 36, *supra*. Thus, in its discussion of the "Findings and Purpose" section of the legislation, S. Rept. No. 638, 88th Cong., 1st Sess. (1963), states at pp. 5-6, among other things, that:

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truly before it, with the complete absence of any such consideration up to and through enactment of the 1970 Amendments, affords a convincing demonstration that the pertinent legislative history is contrary to the decision below.

[18] Section 1 of the 1963 Act was renumbered as § 101 by a 1965 amendment (79 Stat. 992) which did not change the language of the section.

> "*Section 1.* This section of the proposed revision of existing law is an expansion and clarification of the provisions of section 1 of existing law and there are several portions of this section which merit particular attention.
>
> * * * *
>
> "Financial and technical assistance would be made available to State and local governments for the development and execution of their air pollution prevention and control program. *This legislation recognizes the importance of protecting our air resources and accordingly provides not only for research and developmental programs, but also provides for procedures to be followed in enforcing air pollution abatement.*" (Emphasis added.)

See, also, H. Rept. No. 508, 88th Cong., 1st Sess. (1963), at 4, 6.

Hence, it was because the Congress "recognize[d] the importance of protecting our air resources" that it "accordingly" provided for the research and development programs and the abatement procedures contained in the substantive provisions of the 1963 Act. There is no suggestion that the purpose "to protect" the Nation's air resources was intended also to confer upon the Federal Government authority to establish other programs or abatement procedures deemed to be necessary or desirable for that purpose.[19]

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[19] The abatement procedures of the 1963 Act were contained in § 5 (77 Stat. 396-398) which made the "pollution of air in any State or States which endangers the health or welfare of any persons . . . subject to abatement as provided in this section." They consisted essentially of suits by the Attorney General for the "abatement" of "pollution of air which is endangering the health or welfare of persons in a State or States other than that in which the discharge or discharges (causing or contributing to such pollution) originate." Thus, as is stated in S. Rept. No. 638, *supra* at 9-10, "*Section 5* . . . establishes the manner for Federal action in abating air pollution," by providing "authority for limited Federal partici-

As has been noted, the Air Quality Act of 1967 amended the clause in question to add "and enhance the quality of" after "to protect" (81 Stat. 485). The legislative history of the 1967 Act is equally barren of any indication that the Congress intended by that clause to establish a policy for the prevention of significant deterioration or to authorize any other Federal action not provided for in the substantive provisions of the legislation.[20] Here, too, every indication from the legislative history is to the contrary. For example, S. Rept. No. 403, *supra* at 3, states that:

> *"In order to facilitate the objective of a national abatement program which will enhance the quality of our Nation's air, the amendments provide the Secre-*

pation and assistance under certain circumstances directed towards the abatement of specific air pollution problems." See, also, H. Rept. No. 508, *supra* at 8-9.

[20] The only suggestion, in this litigation or in the prior litigation, that the legislative history of the 1967 Act provides any indication of such a Congressional intent is the statement by the court below that "to a lesser degree, the legislative history of the" 1967 Act "expressed a policy of nondeterioration" (A. 56a). The court cited (*id.*, n. 30) a statement in S. Rept. No. 403, 90th Cong., 1st Sess. (1967), which "quoted Senator Muskie for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.'" That language was taken from a sentence which stated in full: *"We must define the steps necessary* to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future," and Senator Muskie went on in the next quoted sentence to say that: "And recognizing the importance of the economic-technological-environmental relationship *we must develop the requisite framework to implement the desired goals."* S. Rept. No. 403, *supra* at 8-9 (emphasis added). No one has suggested that the Congress in the 1967 Act did "define the steps necessary" to prevent significant deterioration or "develop the framework to implement" any "desired goal" in that regard, and no one has suggested that there is any other legislative history of the 1967 Act indicating an intent on the part of Congress to require prevention of significant deterioration.

tary of Health, Education, and Welfare with the following authority:

"(1) To request an immediate injunction to abate the emission of contaminants which present 'an imminent and substantial endangerment to the health of persons,' anywhere in the country;

"(2) To designate 'air quality control regions' for the purpose of implementing air quality standards, whenever and wherever he deems it necessary to protect the public health and welfare.

"(3) In the absence of effective State action in accordance with the provisions of the act, to establish ambient air quality standards for such regions.

"(4) In the absence of effective State action in accordance with the provisions of the act, to enforce such standards.

"(5) In the absence of action by the affected States, to establish Federal interstate air quality planning commissions." (Emphasis added.)

The "authority" conferred on HEW as thus generally described was conferred by substantive provisions of the legislation which are discussed in detail in the remainder of the Report (particularly at pp. 17-50). For present purposes, however, the important point is that it was the substantive authority which would thus be expressly conferred on HEW that was intended "to facilitate the objective of a national abatement program which will enhance the quality of our Nation's air . . . ." There is no suggestion that the stated purpose to "protect and enhance" the quality of the air was intended to confer some additional authority, such as the prevention of significant deterioration.[21]

[21] Similarly, H. Rept. No. 728, 90th Cong., 1st Sess. (1967), at 1, states that the legislation was "intended primarily to pave the way for control of air pollution problems on a regional basis in accordance with air quality standards and enforcement plans de-

Indeed, under the 1967 Act "air quality control regions" were comprised of areas where, because of "urban-industrial concentrations, and other factors" (§ 107(a)), the air was so polluted that it "endangers the health or welfare of . . . persons" (§ 108(a)). 81 Stat. 491. Thus, as stated in S. Rept. No. 403, *supra* at 4, if "an area is not now a problem area," it is only if and when "the air quality . . . deteriorates below the level required to protect the public health and welfare" that HEW would be "required to designate that region for the establishment of air quality standards . . . ." Senator Muskie similarly stated that: "When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards, enforceable by the Federal Government if the States fail to act." 113 Cong. Rec. 19172 (1967). In short, the procedures for the prevention of air pollution established by the 1967 Act were intended to be brought into play only when the quality of the air had deteriorated below the level specified in the ambient air quality standards, and thus plainly were not intended to prevent significant deterioration of air that would remain as clean as or cleaner than those standards would allow.

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veloped by the States," with HEW being "empowered to initiate action to insure setting and enforcement of standards if a State failed to take reasonable action to achieve compliance." The Report goes on (pp. 1-3) to list 19 additional purposes of the legislation, none of which in any way suggests a purpose to prevent significant deterioration of air quality better than would be required by the ambient air quality standards. That Report, like the Senate Report, discusses the substantive provisions of the legislation at length (see, particularly, pp. 9-38). In contrast, the only specific reference in the reports to the statement of purpose in § 101(b)(1) is the bare statement that the "purposes of this title are revised, by revising paragraph (b)(1), to include provisions to protect 'and enhance the quality of' the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." H. Rept. No. 728, *supra* at 30 (S. Rept. No. 403, *supra* at 40 and 51, is almost identical).

Some reliance was placed below (see A. 56a, n. 30) upon the Guidelines for the Development of Air Quality Standards and Implementation Plans (1969), issued under the 1967 Act by HEW's National Air Pollution Control Administration. That reliance was based upon the statement in the Guidelines (§ 1.51) that, since an "explicit purpose of the Act is 'to protect and enhance the quality of the Nation's air resources,'" "[a]ir quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law." However, as it shows on its face, that Guideline was directed to the establishment of air quality standards under the 1967 Act, rather than to the deterioration of air cleaner than was required by those standards. And, as we have noted, under that Act the standards applied only in control regions comprising areas in which the air already was so dirty as to endanger public health or welfare. In short, the Guideline was directed to circumstances entirely different from those to which the significant deterioration regulations are directed, and the reliance by the court below upon the Guideline's use of the words "significant deterioration" is merely a play on words.

Consequently, the court below erred in finding from that Guideline an "administrative interpretation" that the 1967 Act "expressed a policy of nondeterioration" (A. 55a-56a), at least insofar as that "policy" was equated by the court to the kind of deterioration that the significant deterioration regulations are designed to prevent. A similar error was made in regard to two snippets of testimony from the Senate hearings on the 1970 Amendments, which also were relied on by the court below as showing such an "administrative interpretation" of the 1967 Act (see A. 57a-58a).

For example, HEW Secretary Finch testified that "it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with [the 'protect and enhance'] provision," and that "[w]e shall continue to expect States to maintain air of good quality where it now exists." *Air Pollution—1970*, Hearings before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. (1970), at 132-133. That statement by itself is ambiguous, for there is no indication therein what Secretary Finch considered to be either "significant deterioration" or "air of good quality."

It appears from the context of the statement, however, that Secretary Finch was saying that State plans should not permit deterioration to levels worse than the national standards and should continue to maintain the air at qualities which satisfy those standards. For, in the immediately preceding paragraphs of his testimony, the Secretary recognized that what "the States would have to spell out" were "the measures to be taken to achieve and preserve national air quality standards;" but that, at the same time, "[t]he provision for national . . . standard setting would not impair any State's right to establish standards requiring higher levels of air quality," so that the States "would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so." *Id.*, at 132. That express recognition of a State's *option* or right *to choose* whether air quality be maintained at a level higher than the national standards is inconsistent with the view that the Secretary also meant to say that the States are *required* to prevent significant deterioration of air that would remain as clean as or cleaner than the national standards allow.[22]

[22] The testimony by Secretary Finch was contained in a written statement submitted by Undersecretary Veneman. The other bit of testimony relied upon by the court below was made extemporaneously by Undersecretary Veneman at the time he submitted the Secretary's statement. While that testimony (see A. 57a) may seem to go somewhat further than the Secretary, it generally follows the Secretary's prepared testimony, and hardly could have been intended to contradict the Secretary. Moreover, Mr. Veneman agreed with Secretary Finch that the State plans would be required to spell out measures for attaining and maintaining the national standards, but that the legislation "would not impair any State's right to establish standards requiring higher levels of air quality" if it so chooses. *Air Pollution—1970*, *supra* at 143. Indeed, Mr. Veneman also testified: "Now, I am sure my attorneys and administrators would be shaken up about that, but what if we were to say that any State or locality that is above the national minimum standards that were adopted would not be permitted to go below what they have presently in effect?" *Id.*, at 159. In mentioning that possibility (in a dialogue with Senator Cooper), but noting that the Department's "attorneys and administrators would be shaken up" by it, the Undersecretary could not have understood that such a nondegradation requirement constituted either the "administrative interpretation" by HEW of the 1967 Act or what it in fact proposed in regard to the contents of the pending 1970 legislation.

In any event, the Court of Appeals conceded that the purported "administrative interpretation" of the 1967 Act as expressing a policy for the prevention of significant deterioration would not suffice in the absence of other evidence of "congressional acquiescence in the agency interpretation" when it enacted the 1970 Amendments (A. 59a).[23] But that court concluded that the

[23] The Court of Appeals cited its own decision in *Chisholm* v. *F.C.C.*, —— U.S. App. D.C. ——, 538 F.2d 349 (1976), cert. den., No. 76-205 (1976), and partially quoted therefrom (see A. 59a, n. 34). The full discussion in *Chisholm*, including additional citations of supporting decisions by this Court, may be found at p. 361 of 538 F.2d. We do not agree, however, that "congressional acquiescence" in the "agency interpretation" of the 1967 Act would suffice to validate the significant deterioration regulations. This is not a case "where Congress has re-enacted the statute without pertinent change," as in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974), which was cited and quoted in the opinion below (A. 60a). The 1970 Amendments substantially revised the 1967 Act, including enactment of the entirely new § 110. At the very least, if the mandatory "shall approve" language in that section is to be disregarded, there would have to be substantial legislative history

"committee reports [on the 1970 Amendments] contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970" (A. 60a). In fact, the court relied in that regard only upon a single passage from the Senate Report (A. 57a-58a). Indeed, that passage is the *only* piece of legislative history, from the enactment of the "to protect" language by the 1963 Act through enactment of the "and enhance" language by the 1967 Act and up to and including enactment of the 1970 Amendments, in which it even has been claimed, by the court below or by any litigant, that any member of the Congress has expressed the view that the "protect and enhance" purpose clause requires the prevention of significant deterioration.

That passage in S. Rept. No. 91-1196, 91st Cong., 2d Sess. (1970), at 11, reads as follows:

> "The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels already are relatively low, the attainment and maintenance of these goals should not require an extended time period. *In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established deterioration of air quality*

affirmatively indicating that the Congress so intended. Mere "acquiescence" in an "agency interpretation" that the "protect and enhance" purpose clause as contained in the 1967 Act expressed a "policy" of preventing significant deterioration surely would not be enough. Without more, for example, the reasonable conclusion would be that the Congress left the implementation of that policy to the States under § 116 and to the new source performance standards established under § 111. See pp. 35-38, *supra*, and pp. 53-54, *infra*.

> *should not be permitted except under circumstances where there is no available alternative.* Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control —deterioration need not occur." (Emphasis added.)

We note that the foregoing passage from the Senate Report does not mention or otherwise refer to either the "protect and enhance" purpose clause in § 101(b)(1) of the Act or the purported "administrative interpretation" by HEW of that clause as including a policy of preventing significant deterioration of air quality that would remain as good or better than the quality required by the national standards.[24] Plainly, therefore, that passage could not evidence Congressional acquiescence in such an administrative interpretation even apart from the fact, as we have demonstrated, that no such administrative interpretation existed. But however that may be, there are numerous other reasons why that passage does not justify the significant deterioration regulations.

(a) The language in the passage that we have emphasized in itself is ambiguous. It could mean one of two things: first, air that is "already equal to, or better than, the air quality goals" (*i.e.*, the national secondary standards)[25] should be maintained at a level that is either equal to or better than the national standards (*i.e.*, at a level which satisfies those standards) unless there is no

[24] Indeed, insofar as we have discovered, no member of Congress ever asserted, until after the *Ruckelshaus* case was instituted, that that purpose clause embodied a policy to prevent significant deterioration.

[25] Among other things, the bill that was enacted substituted the term "secondary ambient air quality standards" for the term "national goals" which was used in the Senate bill.

available alternative; or, second, air that is "better than" should be maintained at a level which is better than, and air that is "equal to" should be maintained at a level which is "equal to" the national standards, unless there is no available alternative.

(b) The second interpretation proves too much, insofar as the significant deterioration regulations are concerned, as it would not permit any deterioration except where there "is no available alternative." This reading would not permit "incremental" deterioration in any of the classes or the possibility of a Class III redesignation where deterioration down to the national standards is permitted by the regulations. See pp. 11-13, *supra*.

(c) The entire context of the above-quoted passage indicates that the first interpretation—air quality that is equal to or better than the national standards should continue to comply with those standards—was intended. The passage as a whole is directed to and elaborates upon "the Committee's view that," while the "bill would not require the attainment of air quality goals within a specified time period," nonetheless "progress in this direction should be made as rapidly as possible." The context of that passage within the Report as a whole further indicates that the first interpretation was intended. It appears in a section (pp. 9-11) devoted to the statutory provision (§ 109 of the Act) for the establishment of the national primary and secondary standards or goals at levels sufficient to protect the public health and welfare. The provisions of the bill relating to implementation plans (which became—as revised—§ 110 of the Act) are discussed in another section of the Report (pp. 11-15), which states, among other things, that the "bill . . . would require that each State . . . adopt a plan for the *implementation of standards at least as stringent as the national ambient air quality standards*" (p. 12; emphasis

added), and that the Secretary of HEW [26] would have "the authority to replace all or any portion of any implementation plan submitted by a State *where attainment of the nationally* [*sic*] *ambient air quality standard within the time required is not provided*" (p. 14; emphasis added).

(d) As the immediately foregoing excerpts from the Senate Report indicate, the provisions which became § 110 of the Act were in fact intended to authorize disapproval of State implementation plans, and Federal amendment of those plans, only if they did not provide for attainment and maintenance of the national standards. As that Report also states (at p. 12), the "Committee bill . . . would provide for the substitution of [Federal] authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." This is confirmed by the section-by-section analysis in the Senate Report. In regard to the provision of the bill which (with some revision) was enacted as § 110 of the Clean Air Act, the Report states (at p. 55), in part, that:

> "The Secretary *shall approve* a plan if, among other things, it provides for *attainment of the standards* within 3 years, includes emission requirements and schedules of compliance, includes provisions for monitoring devices, includes effective procedures, including land use and air and surface transportation controls and permits, to insure that all air pollution sources will not prevent or interfere with the *attainment and maintenance of such standards and goals*, and provides that the State has adequate personnel, funding, and authority to carry out and enforce the

[26] While the Senate bill provided for the Secretary of HEW to exercise the Federal functions provided for therein, the bill enacted in 1970 provided that the Administrator of EPA would exercise those functions.

plan, including emergency powers comparable to section 303 of the Clean Air Act." (Emphasis added.)

The above quotation summarizes the Senate bill's version of the requirements specified in § 110(a)(2) of the Act. Hence, the Senate Report confirms the plain meaning of § 110(a)(2) that EPA "shall approve" a State implementation plan that satisfies those requirements.

(e) H. Rept. No. 91-1146, 91st Cong., 2d Sess. (1970), also affirmatively demonstrates that the Congress meant what it said by the "shall approve" language in § 110(a)(2) of the Act. Under the House bill, after establishment of the "national ambient air quality standards," a State would "adopt a plan for the implementation (principally by prescribing appropriate emission standards) and enforcement of such standards." *Id.*, at 2. If a State "does not adopt a plan or adopts a plan which does not meet the statutory requirements . . . , the Secretary may publish proposed regulations setting forth a State plan." *Ibid.* Thus, "if the State adopts such a plan [for the implementation, maintenance, and enforcement of the standard], such plan *will be applied* in such State, if the Secretary determines that—(1) the State plan *assures achieving such standard* within a reasonable time," includes adequate enforcement authority and provisions for intergovernmental cooperation, "and (4) such plan contains adequate provision for revision from time to time to take account of improved or more expeditious methods of *achieving the standards.*" *Id.*, at 7-8 (emphasis added). Only if the State does not adopt an implementation plan which "meets [those] requirements" did the House bill authorize the proposal and promulgation of Federal "regulations setting forth a plan which would be applicable to such State." *Id.*, at 8.

(f) The Conference Report confirms that the "shall approve" language of § 110 as reported and enacted was

intended to mean just that. In discussing that provision, H. Rept. No. 91-1783, 91st Cong., 2d Sess. (1970), at 45, states:

> "Under the House bill after promulgation of a national ambient air quality standard, each State was to . . . adopt a plan to implement such standard (or the more stringent State standard). The Administrator *was to approve the plan if it assured achievement of the standard within a reasonable time* and contained adequate provision for State enforcement, intergovernmental cooperation to attain standards, and revision of the plan under specified circumstances.
>
> "The House bill authorized the Administrator to propose a plan applicable to any State, *if it failed to submit an acceptable plan* within the allotted time . . . .
>
> "Under the Senate amendment each State was to . . . adopt a plan to implement the national ambient air quality standards (or the more stringent State standards) and national ambient air quality goals. The Administrator *was required to approve the plan if he found it provided for attainment of the standard* within three years from the date of approval of the plan . . . .
>
> "The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented . . . ." (Emphasis added.)

(g) As the above quotation from the Conference Report also indicates, the legislative history of the 1970 Amendments further demonstrates that the imposition of "more stringent" standards or requirement was intended to be left to the individual States. See pp. 35-37, *supra*.

For example, H. Rept. No. 91-1146, *supra* at 1, states that the "States will be left free to establish stricter standards for all or part of their geographic area." And, S. Rept. No. 91-1196, *supra* at 2, agrees that the "right of the States to set more stringent standards of air quality has been preserved." See, also, *id.*, at 10, 15 and 56. So, too, the legislative history demonstrates a congressional intent to rely upon the new source performance standards under § 111 of the Act for the Federal role in minimizing deterioration of clean air. See pp. 37-38, *supra*. "The purpose of this new authority" for the establishment of "Federal emission standards for new stationary sources" is "to prevent the occurrence anywhere in the United States of significant new air pollution problems arising from such sources . . . ." H. Rept. No. 91-1146, *supra* at 3. "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources." S. Rept. No. 91-1196, *supra* at 2.[27]

(h) The single passage in the Senate Report upon which the Court of Appeals relied for its decision upholding the significant deterioration regulations comprises one paragraph (about one-fourth of a page) of a Senate Report that is about 129 pages long. No one has even claimed that there is a comparable passage in the House Report, in the Conference Report or in the extensive floor debates that preceded enactment of the 1970 Amendments. In contrast, when the Congress did in fact consider whether or not the Act should be amended to include a significant deterioration provision, in the last session of the Congress, the proposed amendment was very controversial, and resulted in extensive discussion in the committee reports and floor debates.[28] We think

[27] Additional legislative history to the same effect is collected in *National Asphalt Pavement Ass'n* v. *Train*, *supra* at 783.

[28] See the Petition in No. 76-529, at 20-24.

it plain, therefore, that the single passage in the Senate Report, which in itself is at least ambiguous, is much too slim (if not nonexistent as) a foundation to support the superstructure of the significant deterioration regulations, overriding not only the plain language of § 110 of the Act but also three decisions by this Court holding that such language does indeed mean what it clearly says. The Congress could not conceivably have treated so lightly a purported requirement which, as EPA stated in proposing the regulations (38 F.R. 18986; A. 94a), "will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States," and "could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods." In any event, the legislative history of the 1970 Amendments, demonstrating that the Congress did in fact intend the "shall approve" language in § 110 to mean what it says, leaves no reasonable doubt about the matter.

7. *Conclusion.* The significant deterioration regulations cannot be upheld unless the express language of § 110 of the Clean Air Act is disregarded. Under that language, EPA "shall approve" State implementation plans that meet the requirements specified in § 110(a)(2), and EPA is authorized to promulgate regulations amending such a plan only insofar as it is not "in accordance with" those requirements. Those requirements do not include the prevention of significant deterioration, and no one has contended otherwise. We have shown that there is no basis for disregarding that express statutory language. It has been construed by this Court and by EPA to be mandatory in fact as well as in form, and the legislative history confirms that it was so intended by the Congress. The significant deterioration regula-

tions also are inconsistent with other provisions of the Act, and are not supported by the "protect and enhance" purpose clause in § 101(b)(1) of the Act.[29]

The conclusion that the significant deterioration regulations are, therefore, invalid is consistent with reason as well as with the statute. After all, the national primary ambient air quality standards are intended to be fixed at levels "requisite to protect the public health" after "allowing an adequate margin of safety," and the national secondary standards are intended to be set at levels "requisite to protect the public welfare from any known or anticipated adverse effects" from air pollution. And further Federal protection of air quality is provided by the new source performance standards, under which a new stationary source of air pollution cannot be constructed or operated unless it uses the best available system of emission controls that is economically feasible.

Surely, it was reasonable for the Congress in such circumstances to leave any further protection of air quality

[29] The court below also relied to some extent by the "acceptance" of the *Ruckelshaus* decision "in a number of other circuits." See A. 62a, n. 36, and the accompanying text. As an examination of the opinions in most of the cases in the other circuits will disclose, they simply referred to the *Ruckelshaus* decision without purporting to make an independent judgment about the significant deterioration issue. While there was some discussion in *Natural Resources Defense Council, Inc.* v. *Environmental Pro. Ag.*, 489 F.2d 390, 408 (5th Cir., 1974), which was reversed in what we have been referring to as the *Train* case (421 U.S. 60), and in *Natural Resources Def. Coun., Inc.* v. *U.S. Environmental Pro. Agcy.*, 507 F.2d 905, 913-914 (9th Cir., 1974), the issue had not been briefed. In the Fifth Circuit, the nondegradation issue was raised in the petitioner's brief in a short two-page argument which simply stated that the issue had been settled by the *Ruckelshaus* decision, and EPA did not respond to that argument. In the Ninth Circuit, the issue was not even raised in the briefs of either party. In any event, for the reasons stated herein, to the extent that the decisions in other circuits provide any support for the decision below in this case, those decisions also are erroneous.

to the option of individual States and localities, as in fact was done by § 116 of the Act. While some States or localities might prefer air of the highest purity for esthetic or other reasons, other States or localities may prefer to encourage economic development to the extent consistent with the national primary and secondary standards and the other substantive provisions of the Clean Air Act. Leaving that decision to the option of the individual States and localities simply conforms with a policy of the Act which has existed from its outset, and which continues to be asserted (in § 101(a)(3)): "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." But however that may be, the significant deterioration regulations plainly conflict with the Clean Air Act enacted by the Congress and should be held by this Court to be invalid.

II. The Provisions in the Regulations for Reclassifying Federal and Indian Lands Violate the Clean Air Act.

The significant deterioration regulations establish a classification system under which the increments of particulate matter and sulfur dioxide that would be allowed basically is related to the degree of economic growth or development deemed to be desirable. In Class I areas, practically any increase in those pollutants and thus economic growth is prohibited; in Class II areas somewhat greater increases are allowed, but significantly less than would be allowed by the national primary and secondary standards; and in Class III areas, those pollutants and economic growth could be increased to the level allowed by the national standards. See pp. 11-13, *supra*.

While all areas throughout the country initially were placed in Class II, the regulations establish a reclassification procedure. In general, a State may propose reclassification of an area within its boundaries, based upon

its consideration of anticipated growth and the social, environmental and economic effects thereof upon the area and upon regional or national interests, subject to review and approval by EPA. However, a Federal land manager also may propose reclassification of Federal land under his jurisdiction (to a "more restrictive designation" only), and only the governing body of an Indian tribe may propose reclassification of the tribe's lands if the State in which the lands are located does not exercise jurisdiction over them under other laws. On the other hand, private and municipal landowners have no right to propose a reclassification of their lands, or to require the State to consider doing so, or to obtain EPA review if a State does not do so. See p. 12, *supra*. And, a reclassification of Federal or Indian land will (if more restrictive) govern the use of adjoining lands, up to 60 or 100 miles from the borders of the Federal or Indian land, if by reason of wind drift the level of particulate matter or sulfur dioxide in the air over the Federal or Indian lands would be affected. See p. 11, *supra*.

There will be no need to reach the issues as to the validity of those reclassification provisions if the Court holds, as we urge in Part I of our Argument, that the regulations are invalid in their entirety. For purposes of this part of our Argument, therefore, we necessarily assume a holding that EPA does have general authority to issue regulations preventing significant deterioration. We demonstrate below that, even so, the provisions for reclassification of Federal and Indian lands are inconsistent with the Clean Air Act. And, although the question does not appear to have been included in this Court's limited grant of certiorari, we also shall demonstrate that the Court of Appeals erred in holding that the issue as to the validity of the reclassification provisions is not ripe for judicial review.

1. *The reclassification provisions are in derogation of the primary responsibility of each State for assuring air quality within its boundaries.* The enactment of the 1970 Amendments to the Clean Air Act marked the beginning of a substantial Federal role in establishing national standards and requirements regarding air pollution, but the primary responsibility for implementing the Federal standards or requirements clearly was intended to remain with the individual States. See *Train* v. *Natural Resources Def. Council*, *supra* at 64. Section 107(a) of the amended Act provides that:

> "*Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State* by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." (Emphasis added.)

That statutory delegation of responsibility expressly extends throughout "the entire geographic area comprising such State" without any exception being made—either in § 107 or elsewhere in the Act—for either Federal or Indian lands. In accordance with the primary responsibility thus delegated, it is an individual State which has the authority under § 110(a) to design an implementation plan, applicable to "each air quality control region (or portion thereof) within such State," which will satisfy the national standards and requirements in the manner deemed most responsive to local needs and conditions. Under § 110(c), EPA can promulgate regulations amending a State implementation plan only if, and insofar as, the State fails to develop a plan which adequately complies with the requirements of the Act, and such regulations become part of a State plan or plans rather than comprising an independent Federal imple-

mentation plan. See pp. 4-5, *supra*. And, it is only the individual States and political subdivisions thereof that are authorized by § 116 to impose air quality standards and emission limitations that are more stringent than those required by the Clean Air Act.

The legislative history of the 1970 Amendments demonstrates that the Congress did not intend the responsibility and authority delegated to the States by the text of the Act to be a mere gesture. Thus, in discussing provisions allowing Federal enforcement of implementation plans only as a supplement to State enforcement, S. Rept. No. 91-1196, *supra* at 21, states that:

> "The Clean Air Act as amended recognizes that the primary responsibility for control of air pollution rests with State and local government. While [the section] would restructure the enforcement authority available to the Secretary, the Committee does not intend to diminish either the authority or the responsibility of State and local governments."

The continuing authority of the States to formulate the means for achieving control of air pollution was also noted and approved repeatedly in floor debate as, for instance, when Sen. Cooper, the ranking minority member of the committee which drafted the bill, noted that in formulating implementation plans, "States and communities must make economic decisions, and decisions on the future growth of their areas and the kind of life they want, in considering alternative means of achieving clean air." 116 Cong. Rec. 32918 (1970).[30]

In short, the 1970 Amendments "explicitly preserved the principle" that each State should have the primary

[30] See also, *e.g.*, *id.*, at 33114-15 (Sen. Prouty) ("[I]t is the right and duty of each State to develop its own plans to implement the standards set by the Secretary."); *id.*, at 42520 (Rep. Staggers) ("The States on the other hand will have primary responsibility for the enforcement of State plans . . . .")

responsibility for assuring air quality within its boundaries. *Hancock* v. *Train*, *supra* at 169; *Train* v. *Natural Resources Def. Council*, *supra* at 64. This latitude given the States, within the general framework of the Federal standards and time requirements, to design and implement the actual air quality plans is essential to the development of plans which will best respond to local environmental and economic needs.[31]

Indeed, in proposing the significant deterioration regulations, EPA itself acknowledged that the Act "places primary responsibility for the prevention and control of air pollution on the States and local governments" (39 F.R. 31001; A. 167a), and that (*ibid.*):

> "Any policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments . . . ."

[31] See *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114, 115-116 (1972):

> "Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared 'that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.' . . . 42 U.S.C. § 1857 (a)(3).
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> * * * *
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> "[G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution . . . . Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.
>
> "As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations."

But while EPA goes on to state (*ibid.*) that "in the regulations promulgated herein, the primary opportunity for making these decisions is reserved for the States and local governments," that plainly is not true insofar as Federal land managers and the governing bodies of Indian tribes are given independent authority to propose reclassification of lands under their respective jurisdictions, subject only to approval by EPA. This is emphasized by the fact that a reclassification of Federal lands pursuant to a proposal by a Federal land manager overrides any reclassification of such lands pursuant to a State proposal (40 C.F.R. § 52.21(c)(3)(iv)), and a State has no authority to propose redesignation of Indian lands within its boundaries as to which the governing body of an Indian tribe is given such authority.

Despite the responsibility and authority which a State bears under § 107(a) of the Act to assure air quality within its boundaries, a State has no power even to review a reclassification proposed by a Federal land manager or Indian governing body. Should a State object to a reclassification proposed by one of those entities, its only recourse is to protest to EPA, after which that agency will determine if the reclassification "appropriately balances" social, economic and environmental concerns of that and surrounding areas and national interests. See pp. 12-13 *supra*. In sum, the States, whose authority and responsibility to make air quality and land use decisions in the development and enforcement of § 110 implementation plans were carefully preserved by the Congress, have no primary role in the reclassification decisions by Federal land managers and Indian governing bodies under the significant deterioration regulations.

The States are largely excluded from those decisions despite the fact that the effects of reclassifying Federal or Indian lands extend far beyond the areas covered by

such lands. Reclassification of Federal or Indian lands thus impairs the ability of a State to develop a coherent air quality and land use plan for adjoining private and State lands. The regulations explicitly provide that the construction or modification of a new source covered by the regulations will not be permitted if the effect of that source on air quality concentrations will cause a violation either of the air quality increments applicable in the immediate area *or the increments applicable in any other area*. 40 C.F.R. § 52.21(d)(2)(i). EPA itself has emphasized the drastic effect of this provision:

> "Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away . . . . Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extend well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. . . ." 39 F.R. 42512; A. 218a-219a.

EPA went on to state that the maximum distance at which this "drift factor" would limit growth outside a Class I area would be 60 to 100 miles. (39 F.R. 42513; A. 219a-220a). The reclassification of Federal or Indian lands, then, particularly to Class I, would limit pollutant increases to the increments of that class, and thus dictate

growth and development, not only on those lands, but also on adjacent State and private lands for many miles around.

This nullification of the primary responsibility of each State "for assuring air quality within the entire geographic area comprising such State" occurs in every State in which any Federal or Indian land is located. Its most pervasive effect, however, is in the western States because of the widespread incidence of Federal and Indian lands in such States, as is shown by the map attached as Appendix C hereto. Indeed, the checkerboard pattern which generally prevails in the distribution of Federal lands in several western States results in most, if not all, other lands being located less than the distance from Federal or Indian lands in which the "drift factor" may be operative. The "primary responsibility" of those States has been drained of virtually all substance, insofar as classification of lands for purpose of the significant deterioration regulations is concerned, and decisions concerning economic growth and development that are of vital importance to the peoples of those States have been handed over in large measure to Federal land managers and the governing bodies of Indian tribes.

We think it obvious, therefore, that the provisions in the regulations for the reclassification of Federal and Indian lands are invalid, even if the Act is construed to require the prevention of significant deterioration of air that nonetheless will comply with the national primary and secondary standards. Those provisions plainly are incompatible with the Act's delegation to the individual States of primary authority to assure air quality within the entire geographic area of the particular State. This is particularly so since the regulations effectively deprive a State of that primary authority not only in regard to Federal and Indian lands, but also in regard to adjacent State and private lands for a distance of up to 60 or more

miles from the boundaries of the Federal and Indian lands.

2. *The reclassification provisions arbitrarily discriminate against private and municipal landowners.* As we have noted, regulations promulgated by EPA under § 110 (c) of the Act revise and become a part of State implementation plans. In effect, EPA acts as a surrogate for a State insofar as the State fails to exercise its primary authority to devise an implementation plan that meets the requirements of the Act. But EPA has gone far beyond that role in the reclassification provisions of the significant deterioration regulations.

The only landowners or managers granted an independent right to propose reclassification of their lands are Federal land managers and Indian governing bodies. No private or municipal landowner or manager is given such powers by the regulations and, indeed, the regulations do not even provide any procedure by which those landowners may suggest to the States that their lands be reclassified. And, if a State should refuse to consider or propose reclassification of such lands, the private and municipal landowners or managers have no right under the regulations to have that refusal reviewed by EPA.

Neither § 110(c) nor any other provision of the Clean Air Act authorizes or requires such discrimination by a State against its own private landowners and local governmental units in favor of Federal and Indian landowners or managers. Surely, it is most unlikely that a State would voluntarily discriminate in that manner, and it is virtually impossible that all of the States would do so. Consequently, by incorporating such discriminatory provisions in the implementation plans of all States, in the exercise of its role as a surrogate for the States, EPA has acted arbitrarily and capriciously even if its actions in that regard were not contrary to express provisions of the Act.

3. *The provisions for reclassification of Federal lands are inconsistent with § 118 of the Act and are without any statutory basis.* As revised by the 1970 Amendments, § 118 of the Act provides in part that:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements. . . .*" (Emphasis added.)

Section 118 goes on to authorize the President to exempt agencies in the executive branch from that requirement, for periods of up to one year, in limited circumstances that are not applicable here.

Section 118 is the only statutory provision cited by EPA in attempting to justify its promulgation of the provisions in the regulations authorizing Federal land managers to propose reclassification of Federal lands. EPA stated (39 F.R. 42513; A. 222a) that:

> "[T]he regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality. . . ."

On its face, this comment does not even purport to claim that the provisions are authorized by § 118, but merely that they are "consistent" with that section. But the special powers given Federal land managers are, in fact, wholly inconsistent with § 118. That section was not intended to afford a grant of power to Federal agencies, but rather to be a restraint directing "that all Federal agencies shall comply with the requirements of the Act just as a nonfederal agency or individual must do in the administration of any real property or facility and in the conduct of any activity." S. Rept. No. 91-1196, *supra* at 59. While the decision in *Hancock* v. *Train*, *supra*, held that § 118 did not submit Federal agencies to State permit requirements, it recognized that the "parties rightly agree that § 118 obligates Federal installations to conform to State air pollution standards or limitations and compliance schedules." 426 U.S., at 181.

Far from serving as a source of authority for Federal land managers to adopt substantive standards which will control activities on State and private lands, § 118 thus stands for the principle that individual Federal entities have no greater statutory power to set substantive standards for air quality than any private landowner does. EPA's comment that the Act does not preclude the Federal Government from meeting more restrictive standards is quite beside the point. Even without any authority in these regulations, the Federal Government could adopt restrictive policies designed to enhance air quality on its lands, in the exercise of its proprietary powers over those lands.[32] The regulations, however, are far more than merely declaratory of the Federal Government's proprie-

[32] We note, however, that neither § 118 nor any other provision of the Clean Air Act purports to give EPA any supervisory authority over actions by other Federal agencies in that regard.

tary powers over its lands. They grant the Federal land managers affirmative powers over the use of private and State land nowhere envisioned by the Act. See pp. 63-65, *supra*.

EPA also suggested in its explanatory comment that the provision in question "ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality." [33] But here again, such reclassification authority is not necessary insofar as the use of such Federal lands are concerned, as the Government can limit or preclude such use in the exercise of its proprietary authority. Moreover, each State's responsibility under § 107(a) of the Act to assure air quality within "the entire geographic area comprising such State" includes air quality in national parks and forests located within the State. And, the provisions of the regulations governing State-proposed reclassifications require consideration of "any impacts of such proposed redesignation upon regional or national interests." See p. 12, *supra*.

In any event, the reclassification powers granted to Federal land managers and Indian governing bodies can be exercised on the basis of considerations unrelated to air quality effects. They need consider only anticipated growth in the area, and the social, economic and environmental effects of such growth upon that and other areas and upon regional and national interests. See pp. 12-13, *supra*. These considerations permit reclassification of Federal and Indian lands without identification of any adverse air quality effects that otherwise could or would result. Since the Federal Government can prevent construction of any new sources of pollution upon its own lands, entirely apart from this reclassification

[33] The makeweight nature of that suggestion is indicated by the fact that the reclassification provisions apply to all Federal lands, and thus are not limited to national parks and forests.

authority, the practical purpose and effect of such a reclassification must be to prevent or limit construction of new sources on adjacent private or State lands which the reclassification also would interdict by reason of the "drift factor" for as much as 60 or 100 miles distant. And, this could be done, not because of some demonstrable adverse effect upon air quality over the Federal lands, but because the Federal land manager is opposed to anticipated growth in the adjoining areas. In short, this aspect of the regulations transforms the Act into an instrument for Federal control over local growth and development on non-Federal lands, rather than being necessary to prevent deterioration of air quality in Federal parks or national forests.

For these reasons, we submit that § 118 of the Act is not consistent with the reclassification authority conferred by the regulations upon Federal land managers, but rather is inconsistent with that authority, and that the other justifications suggested by EPA are equally unpersuasive.

4. *The provisions for reclassification of Indian lands do not have any statutory basis.* In promulgating the regulations, EPA did not refer to any statutory authority for the provisions regarding reclassification of Indian lands by Indian governing bodies. Those provisions were derived from a misconception of the relationship among Indian tribes, the States and the Federal Government. EPA explained that they were drawn so as not to alter existing relationships between Indians and the State and were "consistent with the independent status of Indian lands not subject to State laws" (39 F.R. 42513; A. 223a).

EPA's assumption that the status of Indian lands would preclude the exercise of State authority over them under the significant deterioration regulations is totally unwar-

ranted. Allowing State control of classification of Indian lands under the regulations would not represent an independent assumption of State jurisdiction over Indian lands condemned by cases such as *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), but rather would be to fulfill the State's duty under § 107(a) of the Clean Air Act to assure air quality within its "entire geographic area." It is well settled that such a general Act of Congress applies to Indians and their lands, "in the absence of a clear expression to the contrary . . . ." *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). *See, e.g., Squire* v. *Capoeman*, 351 U.S. 1 (1956). In short, Congress, which has plenary powers over Indian lands, *Antoine* v. *Washington*, 420 U.S. 194, 203-204 (1975), has permitted, indeed required, the States to exercise over Indian lands the regulatory powers which the EPA would deny them.

Since the powers granted by these regulations to Federal land managers and Indian governing bodies are completely without a statutory basis and are directly in conflict with the primary role given to the States in implementing the Clean Air Act, this Court should hold those portions of the regulations to be invalid even if it upholds the remainder of the regulations.

5. *These issues are ripe for judicial review.* Although the Court of Appeals did not pass upon the merits of the reclassification provisions, holding instead that issues going to the validity of those provisions were not ripe for judicial review, we are not at all certain that the Court desires briefing or argument of the ripeness question. That question does not appear to be "fairly comprised" within the question which the Court itself stated in its limited grant of certiorari (A. 292a): "whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal

and Indian lands within their jurisdiction." See Supreme Court Rules 23-1(c) and 40-1(d)(1) and (2). Thus, the Court may have concluded already that the ripeness holding by the court below is erroneous, so as to desire arguments only on the merits of the reclassification provisions. But since we are not certain that that is true, we shall demonstrate why the ripeness holding is erroneous.

The Court of Appeals concluded that the reclassification provisions were not ripe for review because no Federal or Indian lands had yet been redesignated and the mere "reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct" (see pp. 15-16, *supra*).[34] But the arbitrary discrimination against private landowners and managers, who are not allowed to propose reclassifications, exists regardless of whether Federal land managers or Indian governing bodies exercise the powers which they have been granted. More significantly, perhaps, the mere existence of those powers may affect "present conduct" of petitioners and others.

Under the reclassification provisions as interpreted and applied by EPA, an electric generating utility or other company contemplating new construction on lands adjacent to Federal or Indian lands cannot safely base its

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[34] The Court of Appeals also adverted to the theoretical possibility that EPA might approve substitute State plans that would not include the powers granted to Federal land managers and Indian governing bodies. That possibility also existed in regard to other provisions of the regulations which the Court of Appeals did review on the merits, and it is always theoretically possible that an agency will replace allegedly invalid regulations at some indefinite future time. If such a possibility made issues as to the validity of the regulations unripe, such regulations could never be reviewed except in the context of an actual application thereof—which clearly is not the law. See, *e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 199-200 (1956); *Frozen Food Exp.* v. *United States*, 351 U.S. 40, 43-45 (1956); *Columbia System* v. *United States*, 316 U.S. 407, 418-419 (1942).

plans upon the existing classification of those lands. If a Federal land manager or Indian governing body merely announces that it is considering proposing a reclassification, both pending and future applications for permission to construct a new source will not be granted until EPA has acted upon the reclassification proposal and will be subject to the incremental limits applicable under the revised classification if the proposal is approved. See p. 13, *supra*. Thus, when Montana Power Company and four associated petitioners applied for a permit to build two additional units at their Colstrip, Montana, electric generating complex, EPA stated that it could not take final action upon the application, even though the units would not violate Class II standards for the area, until it has passed upon a proposal by the Northern Cheyenne Indian Tribe to reclassify its neighboring reservation to Class I.[35]

In these circumstances, where the mere existence of a regulation means that a business "cannot cogently plan its present or future operations," *United States* v. *Storer Broadcasting Co.*, *supra* at 200, issues as to the validity of the regulations plainly are ripe for review. As long ago as *Euclid* v. *Ambler Co.*, 272 U.S. 365 (1926), this Court held that judicial review is appropriate when the existence of a government regulation disrupts a party's planning for future development of property. This is particularly so where "the fitness of the issues for judicial

[35] See the September 16, 1976 public notice reproduced in Appendix B hereto. In subsequent judicial proceedings, the utilities obtained a declaratory judgment that the units are not subject to preconstruction review under the regulations because they had "commenced construction" on or before June 1, 1975 within the meaning of 40 C.F.R. § 52.21(b)(7). *Montana Power Co., et al.* v. *Environmental Protection Agency, et al.*, 9 ERC 2096 (D. Mont., January 27, 1977). That decision has been appealed. EPA has since "propose[d] for public comment approval of" the reclassification of the Northern Cheyenne reservation. 42 F.R. 21819 (April 29, 1977).

decision," as well as "the hardship to the parties of withholding court consideration," is apparent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). The question of whether the reclassification provisions violate the Clean Air Act raises a pure question of law and is sharply focussed. Neither in its promulgation of those provisions nor in its defense of them below has EPA suggested that their validity rests on factual rather than legal judgments. Since further development of a factual record is not necessary to illuminate consideration of the legal issues, those issues are fit for judicial decision at this time. Compare *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158, 163-164 (1967), with *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 171 (1967), and *Abbott Laboratories* v. *Gardner*, *supra* at 149.

Even if the ripeness issue were doubtful, judicial review at this time would be warranted by the Clean Air Act's special provisions for judicial review. The significant deterioration regulations were promulgated as amendments to the State implementation plans, and review of them must accordingly be had under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), which provides that:

> "A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, . . . or after such date if such petition is based solely on grounds arising after such 30th day."

Congress adopted the provisions of § 307(b)(1) limiting the forum and time period for judicial review in order to assure that while judicial review of administrative actions which "would clearly affect the interests of persons" would be available, it would be possible only "with-

in controlled time periods" so as "to maintain the integrity of the time sequences provided throughout the Act . . . ." S. Rept. 91-1196, *supra* at 40-41. See also, 116 Cong. Rec. 33117 (1970) (Sen. Cooper).

The issues regarding the validity of the reclassification provisions are purely issues of law and came into existence when those regulations were promulgated. Hence, petitions challenging those provisions come within the requirement in § 307(b)(1) that they "shall be filed within 30 days from the date of such promulgation," as in fact was done. In *Buckley* v. *Valeo*, 424 U.S. 1, 117 (1976), this Court recognized that the ripeness doctrine must be applied in the light of the Congressional purpose in enacting a special jurisdictional statute providing for expedited judicial review, and held that it therefore was "warranted in considering all . . . aspects of the Commission's authority which have been presented by the certified questions."

To give considerable weight in this manner to an expedited review statute does not undercut the ripeness doctrine; it merely indicates that, when Congress has determined that the administrative scheme would best be served by early and definitive judicial review, one of the principal rationales for the ripeness doctrine, that of protecting administrative agencies from premature judicial intervention, *see Abbott Laboratories* v. *Gardner*, *supra* at 148, is inapposite. Here too, Congress, in enacting § 307 of the Clean Air Act, was evidently concerned to have questions about the legality of regulations and implementation plans settled as expeditiously as possible in order to achieve the Clean Air Act's goal of requiring States "to attain air quality of specified standards, and to do so within a specified period of time." *Train* v. *Natural Resources Def. Council, Inc.*, *supra* at 64-65 (1975). To further that Congressional purpose, this Court should proceed to review the provisions concerning

Federal land managers and Indian governing bodies at this point.

There is even a more pressing need for judicial review at this time in the present case than in *Buckley*. Not only will judicial review at this point help fulfill the Congressional purpose, but it is also necessary if petitioners are to have any opportunity to challenge EPA's authority to impose these provisions, a problem not present in *Buckley*.[36] By providing that a petition to review a State implementation plan may be filed "only" in the appropriate Court of Appeals, and "shall" be filed within 30 days of promulgation of the plan, § 307(b) establishes the exclusive method for judicial review of the plans, as every Court of Appeals which has considered the question has held.[37] After the 30-day period allotted for filing a petition for review has passed, a petition for review may be filed "*only* if the petition is 'based *solely* on grounds arising after such 30th day.'" *Union Electric Co.* v. *EPA*, *supra* at 253 (emphasis added).

In short, to apply the ripeness doctrine to prevent review in this proceeding is not merely to defer review, but to preclude it entirely. Such an application of the doctrine is not countenanced by the decision in *Toilet Goods Association, Inc.* v. *Gardner*, *supra* at 165, where this Court held the point at issue not ripe for review

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[36] Unlike § 307 of the Clean Air Act, § 315 of the Federal Election Campaign Act of 1971, under which review was sought in *Buckley*, does not have a 30-day limitation period, nor does it preclude review under other bases of jurisdiction, such as 28 U.S.C. § 1331.

[37] *Friends of the Earth* v. *Carey*, —— F.2d ——, 9 ERC 1641, 1648 (2d Cir., 1977); *District of Columbia* v. *Train*, —— U.S. App. D.C. ——, 533 F.2d 1250, 1254 (1976); *City of Highland Park* v. *Train*, 519 F.2d 681, 688-689 (7th Cir., 1975), cert. den., 424 U.S. 927 (1976); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390, 392 (9th Cir., 1974), cert. den., 419 U.S. 1034 (1974); *Getty Oil Company (Eastern Operations)* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir., 1972), cert. den., 409 U.S. 1125 (1973).

only after assuring itself that the application of the regulations could later "be promptly challenged through an administrative procedure, which in turn is reviewable by a court."

As we noted at the outset of this discussion, in limiting its grant of certiorari to the question of the validity of the reclassification provisions, this Court may have determined that the ripeness holding by the Court of Appeals is erroneous. But if the Court has not already reached that conclusion, it should do so as is shown above.

CONCLUSION

For the reasons stated in Part I of our Argument, this Court should reverse the judgment below and hold that the significant deterioration regulations are not authorized by the Clean Air Act and are invalid. Even if the Court should hold otherwise in that regard, for the reasons stated in Part II of our Argument it should hold that the provisions for reclassification of Federal and Indian lands by Federal land managers and Indian governing bodies violate the Clean Air Act.

Respectfully submitted,

[List of Attorneys on next page]

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INDIANAPOLIS POWER & LIGHT COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
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APPENDICES

APPENDIX A

§ 101, 77 Stat. 392-393 (1963), 81 Stat. 485 (1967), 42 U.S.C. § 1857

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

§ 107, 84 Stat. 1678 (1970), 42 U.S.C. § 1857c-2

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

§ 108, 84 Stat. 1678-1679 (1970), 42 U.S.C. § 1857c-3

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * * *

§ 109, 84 Stat. 1679-1680 (1970), 42 U.S.C. § 1857c-4

(a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the intitial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary am-

bient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

§ 110, 84 Stat. 1680-1683 (1970), 88 Stat. 256-258 (1974), 42 U.S.C. § 1857c-5

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision

thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations,

and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that

in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public

notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, whenever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

* * * *

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

* * * *

§ 111, 84 Stat. 1683-1684 (1970), 42 U.S.C. § 1857c-6

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which re-

flects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall propose regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * * *

§ 113, 84 Stat. 1686-1687 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857c-8

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the

person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), . . . or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in

which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g)

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

* * * *

§ 116, 84 Stat. 1689 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857d-1

Except as otherwise provided in sections 119(c), (e), and (f), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

§ 118, 84 Stat. 1689-1690 (1970), 42 U.S.C. § 1857f

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall

have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

* * * *

§ 307, 84 Stat. 1707-1708 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857h-5

* * * *

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

* * * *

APPENDIX B

SEPTEMBER 16, 1976

U. S. ENVIRONMENTAL PROTECTION AGENCY
PUBLIC NOTICE

Section 52.21(e) Title 40 CFR regarding the prevention of significant deterioration of air quality provides that prior to final determination on an application to construct a new source, opportunity be given for public comment on the information submitted by the owner or operator and on the analysis underlying the proposed approval or disapproval. The regulation further requires that such information be made available in at least one location in the affected Air Quality Control Region and that the public be allowed a period of 30 days in which to submit comments.

Notice is hereby given that the Environmental Protection Agency, pursuant to 40 CFR, Section 52.1382 (Significant Deterioration of Air Quality) proposes to grant conditional approval of a request by the following applicant to construct a new source in the State of Montana:

The Montana Power Company
40 East Broadway
Butte, Montana 59701

This permit application is being reviewed notwithstanding the fact that the Agency has yet to rule on the applicant's request that the Agency reconsider its earlier decision that the facility is subject to this new source review procedure. In addition, this proposal is subject to the procedure set forth in Section 52.21(d)(5), discussed herein below, which requires that pending permit applications be held in abeyance if consideration of a Class I redesignation is announced prior to permit approval.

The applicant has requested permission to construct two 700 megawatt coal fired electric generating plants in Colstrip, Montana. It has been determined that proper operation of the facility will not cause a violation of the Class II sulfur dioxide or particulate significant deterioration increments. It has also been determined that the plant will reduce emissions by the application of best available control technology as defined in 40 CFR, Section 52.01(f). The Agency's analysis of the aforementioned application, together with the application, is available for public inspection at the Rosebud County Public Library, 201 North 9th Avenue, Forsyth, Montana; and the Denver U.S. Environmental Protection Agency Regional Office. Additional information developed by the State of Montana concerning potential air pollution from the proposed plant during the new source review procedures is available from the State of Montana Air Quality Bureau, Department of Health and Environmental Sciences, State Capitol, Helena, Montana 59601.

The conditions under which the Agency is considering approval are as follows:

a. Unit 3 or Unit 4 shall not cause to be discharged into the atmosphere sulfur dioxide at a rate exceeding 585 grams per second.

b. A continuous monitoring system for measuring sulfur dioxide emissions shall be installed, calibrated, maintained, and operated by the owner or operator. Procedures to be followed for monitoring sulfur dioxide emissions are specified in applicable Sections of 40 CFR 60.45. For the purpose of demonstrating compliance with the emission regulation of conditions (a), 40 CFR 60.45(g)(2) is revised to read as follows:

> (2) Sulfur dioxide. Excess emissions for affected facilities are defined as:

> (i) Any three-hour period during which the average emissions (arithmetic average of three continuous one-hour periods) of sulfur dioxide as measured by a continuous monitoring system exceed the emission level of 1.12 grams of sulfur dioxide per million calorie heat input (0.61 pounds per million BTU).

The owner or operator shall comply with the notification and record keeping requirements specified in 40 CFR 60.7 and with the monitoring requirements specified in 40 CFR 60.13. The written reports of excess emissions shall include average hourly coal feed rates and average daily fuel analysis (as fired) at the time(s) excess emissions are measured by the required continuous monitoring system. Immediate reporting of emissions in excess of this condition may be required if deemed necessary by the Administrator.

c. Sulfur content of coal (as fired) shall not exceed 1%. Fuel analysis shall be in accordance with the following American Society for Testing and Materials methods:

(1) Mechanical sampling by Method D2234065.

(2) Sample preparation by Method D2013-65.

(3) Sample analysis by Method D271-68.

The Company shall maintain records of the fuel analysis for a period of at least two years following the date of such measurements. Fuel analysis shall be done at least once per day. Furthermore, the Company shall record the average hourly coal feed rates to Units 3 and 4 and maintain such records for a period of at least two years following the date of such measurements.

Section 52.21(d)(5) provides that approval of a permit, as proposed hereinabove, cannot be granted until the Agency has acted upon a proposed redesignation to a more stringent class. Once announcement of intention to

redesignate is received by the Agency, then Section 52.21 (d) (5) mandates the holding in abeyance the approval of pending permit application, such as this, which, if approved would violate the announced Class I increments. It has been determined that the Northern Cheyenne Tribe has announced their intention to redesignate to Class I their reservation, located approximately 15 miles south of the proposed facility. Preliminary modeling results indicated that a Class I increment could be violated on the reservation by the proposed facility. The subject permit application will be processed up to the point of final decision by the Agency, however, a final decision, that is, any approval of the permit (other than an approval based on a determination that the proposed facility will not violate a Class I increment within the boundaries of the reservation) will not occur until the Agency has acted on the proposed redesignation, provided the Northern Cheyenne Tribe pursues said redesignation expeditiously and proposes redesignation to the Administrator within a time-frame that is as expeditious as possible following announcement of their intent to redesignate.

It has come to our attention recently that air quality data from the town of Colstrip indicate that the National Ambient Air Quality Standards for particulate matter were exceeded last year. The Denver Regional Office of the Environmental Protection Agency is investigating the effects of this situation on this proposed action.

Public comments are invited on this and other pertinent matters anytime prior to October 16, 1976. Comments may be directed to the U.S. Environmental Protection Agency, Region VIII, David A. Wagoner, Director Air and Hazardous Materials Division, 1860 Lincoln Street, Denver, Colorado 80203. All comments received prior to October 16, 1976 will be considered in arriving at a final determination on the application. Within 30 days of October 16, 1976, the Administrator shall notify the appli-

cant of the intended final decision based on the current designation. The public comments, response to public comments, and the notification of final decision shall be available for public inspection at the Rosebud County Public Library and the Denver U. S. Environmental Protection Agency Regional Office.

FEDERAL LANDS

This map shows Federal ownership and trusteeship by administering agency to the extent the scale permits. Areas smaller than a township (36 square miles) generally are omitted. Areas shown represent holdings as of early 1968 with some updating for significant changes during 1968. Coadministration of areas is shown where administration is divided about equally between agencies.

The map scale does not permit exclusion of areas of nongovernment lands smaller than a township contained within proclamation boundaries. The Fish and Wildlife Service has extensive areas with proclaimed boundaries which contain relatively little Federal ownership. Such areas have been omitted if less than 25,000 federally owned acres are inside the proclamation boundaries.

Several proposed recreation areas are shown which, while accommodating visitors, were not legally established national recreation areas by January 1, 1968. National recreation areas smaller than 25,000 acres are either included as other types of adjacent Federal land or, if isolated, omitted.

The Indian lands are enclosed by boundaries established by treaties or proclamations. In most cases these boundaries enclose more acreage than is held in trust, for it is impractical to separate trust lands from other interspersed lands.

Principal Islands of HAWAII
SCALE 1:7,500,000

ALASKA
SCALE 1:17,000,000

FEDERAL LANDS
PRINCIPAL LANDS ADMINISTERED OR HELD IN TRUST BY FEDERAL AGENCIES: JANUARY 1, 1968

Compiled by U.S. Geological Survey, 1968

Albers Equal Area Projection

SCALE 1:7,500,000

0 100 200 300 400 MILES
0 100 200 300 400 500 600 700 KILOMETERS

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
- Tracts, 50-100% density
- Scattered tracts, approximately 25-50% density. Small scattered tracts not shown

NATIONAL PARK SERVICE
- National park (NP)
- National monument (NM), national seashore (NS), and national recreation area (NRA)

BUREAU OF INDIAN AFFAIRS
- Indian reservation (IR)

BUREAU OF SPORT FISHERIES AND WILDLIFE
- National wildlife refuge (NWR)

BUREAU OF RECLAMATION

DEPARTMENT OF AGRICULTURE
FOREST SERVICE
- National forest (NF)
- Forest purchase unit (PU)
- National grassland (NG)
- Land utilization project (LU)

AGRICULTURAL RESEARCH SERVICE

DEPARTMENT OF DEFENSE
- ARMY, NAVY, AIR FORCE (AF, AFB), Civil Works Projects of Corps of Engineers, and Marine Corps Base (MCB)

DEPARTMENT OF STATE
- INTERNATIONAL BOUNDARY AND WATER COMMISSION, U.S. AND MEXICO

INDEPENDENT AGENCIES
- ATOMIC ENERGY COMMISSION
- TENNESSEE VALLEY AUTHORITY
- NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

U.S. DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

INTERIOR—GEOLOGICAL SURVEY, WASHINGTON, D.C.—1970
FOR SALE BY U.S. GEOLOGICAL SURVEY
WASHINGTON, D.C. 20242
SEPARATE SALES EDITION $1.50
SHEET NUMBER 272